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Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

JOSEPH M. SKUTCHES, M.D. and
ST. LUKE'S PHYSICIAN GROUP,

Petitioners,

v.

BARBARA L. GLASOW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Judge Jack A. Panella of the Pennsylvania Superior Court voted with the majority in a two-to-one appellate ruling that reinstated a large medical malpractice verdict for Respondent Barbara Glasow. After that ruling, Petitioners learned that Judge Panella enjoys a close, longstanding relationship with Martin D. Cohen, Esq., the lead named partner in the small law firm that represents Ms. Glasow. This relationship is established by the following: (1) Attorney Cohen was one of two people selected by Judge Panella to perform the robing ceremony at Judge Panella's investiture on the Pennsylvania Superior Court; (2) in his speech following the robing ceremony, Judge Panella specifically thanked Attorney Cohen for his "guidance and support" and identified him as one of "my good buddies;" (3) Judge Panella, whose office is in the same small town (Bethlehem, PA) as Attorney Cohen's office, spoke on Attorney Cohen's behalf at an honorary event in which other speakers included Cohen's lifelong friend and business partner; and (4) Attorney Cohen and the other named partner of his law firm made substantial financial contributions to Judge Panella during the 2003 election campaign, which resulted in Judge Panella's election to the Pennsylvania Superior Court.

The question presented is whether Judge Panella's failure to either recuse himself or disclose his close, personal relationship with Attorney Cohen raised such a distinct appearance of impropriety that it violated the Due Process Clause of the Fourteenth Amendment.

RULE 29.6 STATEMENT

The parties to this case and appeal are all identified in the caption: Respondent Barbara L. Glasow and Petitioners Joseph M. Skutches, M.D., and St. Luke's Physician Group.

Petitioner St. Luke's Physician Group is a wholly-owned subsidiary corporation of St. Luke's Hospital, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Joseph M. Skutches, M.D., and St. Luke's Physician Group, respectfully submit this petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

CITATIONS TO REPORTS OF OPINIONS AND ORDERS

The Order of the trial court dated May 27, 2008, which awarded judgment notwithstanding the verdict, was not reported. *See Glasow v. Skutches*, No. 2006-C-2210V, Court of Common Pleas of Lehigh County, Pennsylvania (May 27, 2008). (*See* Appendix "B").

The Order and Memorandum of the Pennsylvania Superior Court dated June 4, 2009, which reversed the judgment of the Court of Common Pleas of Lehigh County and reinstated the jury verdict for Plaintiff, was unpublished, but the result is reported at *Glasow v. Skutches*, 981 A.2d 327, 2009 Pa. Super. LEXIS 3593 (Pa. Super., 2009)(unpublished). (*See* Appendix "A").

The Order of the Pennsylvania Supreme Court dated May 26, 2010, which denied allocatur, was reported at *Glasow v. Skutches*, 2010 Pa. LEXIS 1132 (May 26, 2010). (*See* Appendix "C").

JURISDICTION

This Honorable Court is asked to review the Order of the Pennsylvania Supreme Court dated May 26, 2010, which denied Petitioners' Petition for Allowance of Appeal. (*See* Appendix "D"). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

"[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). This case affords a much-needed opportunity for this Court to clarify the circumstances in which a close personal relationship between a judge and a litigant or attorney creates such a distinct "appearance of bias" that due process requires the judge to either recuse himself or disclose the relationship prior to ruling. This question is vitally important to preserving the "reputation for impartiality and nonpartisanship," and

thus the legitimacy, of the judiciary. *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

This is a medical malpractice action that proceeded to trial in the Court of Common Pleas of Lehigh County, Pennsylvania, from January 14, 2008, through January 18, 2008. At trial, Respondent Barbara Glasow ("Ms. Glasow") claimed that Petitioner Joseph M. Skutches ("Dr. Skutches"), her former gynecologist and an alleged agent of Petitioner St. Luke's Physician Group ("St. Luke's"), deviated from the applicable standard of care when he saw her for a breast lump. More specifically, Ms. Glasow claimed that Dr. Skutches failed to properly advise her to have a biopsy, which would have revealed that the breast lump was malignant, delaying a diagnosis and adversely affecting her subsequent treatment and prognosis.

Dr. Skutches and St. Luke's defended by maintaining that Skutches clearly adhered to the applicable standard of care by recommending that Ms. Glasow consult with a surgeon who could and would have determined whether she required a biopsy, and, more importantly, by prescribing an ultrasound for Glasow (because she refused to have a mammogram) that would have been diagnostic if she had not neglected to have the ultrasound performed. Dr. Skutches and St. Luke's also maintained that Ms. Glasow's choice of post-diagnosis treatment for her breast lump, involving a form of "alternative medicine" known as "complimentary medicine" rather than generally-accepted medical care, had a substantial negative impact on her prognosis for which she herself was responsible.

On January 18, 2008, the jury returned a verdict finding Dr. Skutches negligent and Ms. Glasow contributorily negligent, with a comparative negligence assessment allocating a sixty-five percent share to Dr. Skutches (and, by way of vicarious liability, to St. Luke's) and a thirty-five percent share to Ms. Glasow. The verdict for Ms. Glasow totaled $2,582,450, after reduction for her allocated contributory negligence.

By Order dated May 27, 2008, the trial court granted a judgment n.o.v. on the ground that the expert testimony proffered by Ms. Glasow regarding the standard of care was not based on the standard of reasonable medical certainty required by Pennsylvania law. (*See* Appendix "B," Trial Court Opinion in support of May 27, 2008 Order). Ms. Glasow appealed as of right to the Pennsylvania Superior Court.

On January 7, 2009, the case was argued before a three-judge panel of the Superior Court, consisting of Judge Jack A. Panella, Judge John T. Bender, and Senior Judge John T.J. Kelly, Jr. By Order and Memorandum dated June 4, 2009, the Superior Court panel voted two-to-one, with Senior Judge Kelly and Judge Panella in the majority and Judge Bender dissenting, to reverse the judgment of the trial court and reinstate the jury verdict for Ms. Glasow. (*See* Appendix "A," Superior Court Majority and Dissenting Memoranda, June 4, 2009).

Following the June 4th ruling, counsel for Dr. Skutches and St. Luke's obtained public records indicating that Judge Panella, who hails from Northampton County in the Lehigh Valley, has a close,

longstanding relationship with Martin D. Cohen, Esq., the founder and lead named partner of the small Lehigh Valley law firm that represents Ms. Glasow. Most importantly, counsel for Dr. Skutches and St. Luke's obtained the transcript of the ceremony honoring Judge Panella's investiture on the Superior Court on January 4, 2004.[1] At that ceremony, Attorney Cohen was one of two people selected by Judge Panella to perform the robing ceremony. Judge Panella then spoke to those assembled and specifically identified and thanked Attorney Cohen for his "guidance and support." Judge Panella also identified Attorney Cohen as one of "my good buddies."

In addition to Attorney Cohen's involvement in Judge Panella's investiture, the *Allentown Morning Call* reported that Judge Panella spoke on Attorney Cohen's behalf at a dinner honoring the latter's commitment to Penn State University and the Lehigh Valley community. Judge Panella is the first of five speakers identified in the article. The other four speakers were Attorney Cohen's longtime business partner, a "lifelong friend," the president of the organization hosting the dinner, and the president of the United Way of the Greater Lehigh Valley.

Finally, the Pennsylvania Department of State's campaign finance records indicate that Attorney Cohen and the firm's other named partner made substantial financial contributions, totaling at least $4,500, to Judge

[1] This transcript was published in the *Pennsylvania Superior Court Reporter* on the occasion of Judge Panella's investiture.

Panella during the 2003 election campaign, which resulted in Judge Panella's election to this Court.

On June 18, 2009, based in part on the newly-discovered close relationship between Judge Panella and Attorney Cohen, Petitions filed an Application for Reargument in the Pennsylvania Superior Court. The Application, which asserted a federal due process violation, relied heavily on the standards for judicial disqualification set forth by this Court in *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009). By Order dated August 11, 2009, the Superior Court denied Petitioners' Application for Reargument. (*See* Appendix "C").

On September 8, 2009, Petitioners filed a Petition for Allowance of Appeal in the Pennsylvania Supreme Court. The Petition again asserted a federal due process violation and relied heavily on *Caperton, supra*. By Order dated May 26, 2010, the Pennsylvania Supreme Court denied allowance of appeal. (Appendix "C").

REASONS FOR GRANTING THE PETITION

JUDGE PANELLA'S FAILURE TO EITHER RECUSE HIMSELF OR DISCLOSE HIS CLOSE, PERSONAL RELATIONSHIP WITH ATTORNEY COHEN VIOLATED PETITIONERS' DUE PROCESS RIGHTS

A. This Court's Due Process Precedent Was Violated When Judge Panella Failed To Either Recuse Himself Or Disclose His Close, Personal Relationship With Attorney Cohen

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton*, *supra.*, 129 S.Ct. at 2259, citing *In re Murchison*, 349 U.S. 133, 136 (1955). A "neutral and detached judge" is an essential component of this due process requirement. *Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972). "[O]ur system of law has always endeavored to prevent even the probability of unfairness." *Murchison*, 349 U.S. at 136. This "stringent rule," the Court has explained, "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way justice must satisfy the appearance of justice." *Id.* (internal quotation marks omitted).

This Court has elucidated these principles in a series of important cases in which judicial bias was alleged. Most recently, in *Caperton*, this Court examined a scenario in which a state supreme court justice who had received substantial campaign contributions from the

principal officer of a corporation then refused to recuse himself and cast the deciding vote to overturn a large verdict against the corporation. Reversing the state court judgment, this Court reaffirmed that the Due Process Clause requires an objective inquiry to determine whether "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.* at 2257 (internal quotation marks omitted). As this Court explained, the standard for recusal is "not whether the judge is actually, subjectively biased, but whether the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Id.* at 2262 (internal quotation marks omitted).[2] "[T]he disqualifying criteria cannot be defined with precision. *Circumstances and relationships must be considered.*" *Id.* at 2261 (internal quotation marks and citation omitted; emphasis added). Cases involving "extreme facts" or an "extraordinary situation" are more likely to meet the constitutional standard for recusal. *Id.* at 2265.

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[2] Pennsylvania also embraces this objective standard of reasonableness to determine whether judicial disqualification is required. For instance, the Pennsylvania Code of Judicial Conduct states that "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned[.]" Pa. Code Judicial Conduct 3 (c)(1)(2008). Where a judge's participation in a case creates an appearance of prejudice or impropriety, disqualification is required. *See, Commonwealth v. Whitmore*, 912 A.2d 827, 834 (Pa. 2006), *citing In Interest of McFall*, 617 A.2d 707, 714 (Pa. 1992)("There is no need to find actual prejudice, but rather, the appearance of prejudice is sufficient to warrant the grant of new proceedings."). Maintaining both the fact and the appearance of impartiality are "fundamental to public confidence in the judiciary[.]" *In re Cicchetti*, 743 A.2d 431, 442 (Pa. 2000).

In *Murchison*, *supra.*, this Court held that a due process violation occurred when a judge who acted as a "one-man judge-grand jury" in charging a witness with contempt then convicted the defendant of that charge. Having been the accuser, this Court explained, it was unlikely that the judge could be "wholly disinterested" in the outcome of the contempt proceedings. *Id.* at 137.

Likewise, in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), this Court held that a judge who had been subjected to repeated verbal abuse by a criminal defendant could not preside over the defendant's criminal contempt proceedings. *Id.* at 466. Although there was no evidence of actual bias, recusal was required because "[n]o one so cruelly slandered is likely to maintain that calm detachment necessary for fair adjudication." *Id.* at 465; *see also*, *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (stating that a judge who "has been the target of personal abuse or criticism from the party before him" cannot preside in a case involving that part because "experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable").

Finally, in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), this Court found a due process violation where a state supreme court justice participated in the review of a case involving a legal issue that was similar to an issue in a case the justice himself had filed. *Id.* at 825. This Court explained that evidence of actual bias was not required. Instead, this Court had to consider only whether "sitting on the case then before the Supreme Court of Alabama would offer a possible temptation to the average . . . judge to . . . lead him not

to hold the balance nice, clear and true." *Id.* (alterations in original; internal quotation marks omitted). Involvement in a case that could influence the justice's own case presented precisely such a "temptation." *Id.*

This case involves the same type of "extraordinary situation" that has been found to violate due process. *Caperton*, 129 S.Ct. at 2265. Indeed, just as a judge is likely to be biased in favor of a friend or mentor, so too is he likely to be biased in favor of a large campaign benefactor (*Caperton*), or against a witness who the judge has already charged with contempt (*Murchison*), or against a criminal defendant who has repeatedly belittled the judge (*Mayberry*), or in favor of a litigant who argues a position that will assist the judge in his own litigation (*Lavoie*). Such biases are all matters of human nature, and they all violate due process.

Two critical facts make the appearance of impropriety in this case especially vivid. First, while *Caperton* involved financial contributions by an election benefactor, this case involves not only financial support but also a longstanding personal relationship – a relationship so close that Attorney Cohen was chosen to literally "robe" Judge Panella on his ascension to the Pennsylvania Superior Court. In the speech that followed, Judge Panella specifically identified and thanked Attorney Cohen for his "guidance and support," which were, apparently, critical to Judge Panella's success. Judge Panella also identified Attorney Cohen as one of "my good buddies."

Attorney Cohen's prominent role in Judge Panella's investiture ceremony undeniably distinguishes him as

a person who enjoys an especially close relationship with the judge. Such a relationship, which transcends mere financial ties, poses an overwhelming potential for bias that is offensive to due process. It is simply incredible to deny that, at a bare minimum, an appearance of impropriety arises where the head of a small law firm literally places the robe upon a judge who later votes with a one-judge majority to restore a multimillion verdict obtained by the attorney's firm. Whatever the temptation may be to disregard the guiding principle of neutrality on behalf of a campaign benefactor, the objective probability that bias will infect a judge's decisionmaking is far greater when a close friend and mentor has a large financial stake in the outcome of a case. The fact that Attorney Cohen and his small firm stood to earn a seven-figure fee from the reinstatement of the jury's verdict clearly raised "an unconstitutional potential for bias" on the part of Judge Panella. *Id.* at 2262.

Second, the relationship between Judge Panella and Attorney Cohen was never disclosed to the parties or to defense counsel; instead, it was uncovered only after Judge Panella cast the deciding vote to reinstate the verdict for Plaintiff. In contrast, in *Caperton*, the parties were fully aware of Mr. Blankenship's efforts on behalf of Justice Benjamin, they had an opportunity to seek the justice's recusal on at least three occasions, and the justice had an opportunity to consider and address the recusal requests. The likelihood of actual bias increases when the relationship at issue is not open to public scrutiny. *See*, *Richmond Newspapers v. Virginia*, 448 U.S. 555, 570 (1980) (opinion of Burger, C.J.) (recognizing the "nexus between openness, fairness, and the perception of fairness").

Indeed, in an interview granted during his 2009 campaign for the Pennsylvania Supreme Court, Judge Panella himself publicly declared that transparency of the judicial system is necessary to "ensure a fair opportunity in court for all of Pennsylvania's citizens." (*See Pennsylvania Law Weekly* article, October 5, 2009, p. 15; *accord*, *Id.*; "I believe the commonwealth would be better served if the judiciary acted with greater transparency and had to provide a better accounting of its actions."). When asked about the circumstances under which he would recuse himself, Judge Panella stated:

> With campaigns for judicial offices attracting more attention and larger campaign contributions, the potential for, and perceptions of, conflicts of interest have grown tremendously. Therefore, it is important that all judges hold themselves up to the highest ethical standards in order to maintain the public's faith in the judiciary. Therefore, I would recuse myself if a major campaign contributor were involved in litigation as a party or an attorney before me.
>
> . . .
>
> I believe that even an appearance of a conflict of interest triggers recusal. The judiciary must earn and maintain the respect of the electorate; even a mere "appearance" of an impropriety, rather than an established conflict, requires recusal.

(*Id.*, p. 16).

Under these standards, which are consistent with this Court's due process precedent, Judge Panella clearly should have recused himself or at least disclosed his relationship with Attorney Cohen. There can be no doubt that transparency of the judicial system is essential to maintaining its integrity, a mere appearance of a conflict undermines that integrity, and campaign contributions present a well-known threat to the impartiality of elected judges. Because his close relationship with Attorney Cohen created, at a bare minimum, a glaring appearance of impropriety, Judge Panella's subsequent vote to reinstate the verdict for Ms. Glasow was infected by a "probability of actual bias . . . too high to be constitutionally tolerable." *Caperton*, 129 S. Ct. at 2257 (internal quotation marks and citation omitted).

While this much is clear, and while this Court in *Caperton* certainly clarified the standard for recusal based upon significant financial ties, further explication of this murky area of the law is required. In particular, this Court should issue a writ of certiorari to provide authoritative guidance to lower state and federal courts on the standards for recusal or disclosure when a judge has not only financial connections to a litigant or its counsel but also an *especially close* and *undisclosed* personal relationship. *Caperton* poses but does not directly answer the question of whether such a relationship requires recusal.[3]

[3] Chief Justice Roberts' Dissenting Opinion in *Caperton* recognizes that the majority decision leaves unanswered the following question: "Does close personal friendship between a judge and a party or lawyer now give rise to a probability of bias?" *Caperton*, 129 S. Ct. at 2270 (Roberts, C.J., Dissenting).

Moreover, this Court has not addressed the question of who – the judge or the parties – bears the burden of raising the judge's relationship with a party or attorney. There is evident confusion on this question. For instance, on October 26, 2009, the *Pennsylvania Law Weekly* carried a front-page story on the filing of the Petition for Allowance of Appeal in the Pennsylvania Supreme Court, which quoted Judge Panella as criticizing Dr. Skutches and St. Luke's for not raising his relationship with Attorney Cohen sooner. Specifically, although Judge Panella recognized that the Pennsylvania Code of Judicial Conduct prevented him from commenting on a pending case, he stated that "[t]he time to raise it and ask a judge to recuse is at the first time they know of it or should have known it. That was not done in this case." (*See Pennsylvania Law Weekly* article, October 26, 2009).[4]

Judge Panella's published comments suggest that *parties* and *their attorneys* have the burden to uncover and raise friendships or other personal relationships that

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[4] In point of fact, counsel for Dr. Skutches and St. Luke's did not learn of the close relationship between Judge Panella and Attorney Cohen (and, in particular, they did not learn that Attorney Cohen participated in Judge Panella's robing ceremony) until after June 4, 2009, the date on which Judge Panella voted with the majority to reinstate the verdict, and they raised the issue in an Application for Reargument filed on June 18, 2009, within the 14-day period for seeking reargument set forth in Pennsylvania Rule of Appellate Procedure 2542(a)(Time)("(1) Except as otherwise prescribed by this rule, an application for reargument shall be filed with the prothonotary within 14 days after entry of the judgment or other order involved.").

could compromise a judge's impartiality. This burden would prove impossible in many instances because parties and their attorneys generally will not have the time or resources to investigate a judge's interpersonal relationships.[5] Consequently, Dr. Skutches and St. Luke's believe that judges themselves have the obligation to disclose relationships that might raise the appearance of impropriety.

In this case, it was Judge Panella's own failure to disclose the relationship, not the lack of diligence by counsel for Dr. Skutches and St. Luke's, that prevented an earlier disclosure of the relationship. This Court should clarify the apparent confusion regarding who bears the burden of disclosing such relationships.

Review of Judge Panella's participation in this case is warranted to provide authoritative guidance to the lower courts regarding the circumstances in which due process requires recusal or disclosure based on a judge's close personal relationship with a party or its attorney. Judge Panella's refusal to recuse himself or disclose his relationship with Attorney Cohen conflicts with the constitutional standards articulated by this Court and substantially undermined the integrity of the Pennsylvania judicial system.

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[5] The impossibility of meeting this burden is magnified in appeals courts because of the short timelines involved and the large number of judges who might potentially hear the case. In the Pennsylvania Superior Court, for instance, litigants do not learn the identities of the judges who will hear the case until about 45 days before oral argument, and the panel will consist of three or nine judges. Even if parties have adequate resources, they could not adequately investigate each judge's background and relationships in such a short period of time.

B. The Question Presented Is Critical To The Preservation Of Public Confidence In State Judicial Systems Across The Nation

This Court has repeatedly emphasized the importance of maintaining our courts' "reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407 (1989); *see also*, *Republican Party of Minnesota v. White*, 536 U.S. 765, 802 (2002)(Stevens, J., dissenting) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); *and N.Y. State Bd. of Elections v. Lopez Torres*, 128 S. Ct. 791, 803 (2008) (Kennedy, J., concurring) ("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.").

The events of this case implicate the reputation of state judiciaries and present a recurring issue of far-reaching national importance. In fact, while this Court accepted review in *Caperton* to address recusal standards in the context of campaign contributions in judicial elections, that decision impacted only the thirty-nine states that currently elect their judges. Here, the question of when a close personal relationship between a judge and litigant or attorney requires recusal or at least disclosure affects states with both elected and appointed judges. In other words, this case affects the judiciaries of all 50 states. Each of these court systems, and the judges who work within them, need clear guidance with respect to recusal and disclosure standards.

Finally, intervention by this Court is necessary to restore the waning reputations and integrity of state judiciaries. Highly publicized cases, like *Caperton* and *Hood v. State*, 158 S.W.3d 480 (Texas Crim. App. 2005), in which the prosecutor in a capital murder case had a long-term romantic relationship with the trial judge, reflect poorly on the impartiality of state courts. But perhaps the worst case of judicial misconduct has arisen in Pennsylvania itself, which is in the midst of the worst court scandal in its history. In 2009, two state-court judges were accused of accepting more than $2.6 million in kickbacks in exchange for sending thousands of juveniles to private detention centers. *See generally*, Ian Urbina, Despite Red Flags about Judges, A Kickback Scheme Flourished, *N.Y. Times* (Mar. 27, 2009). The Pennsylvania Legislature has declared that this scandal, which is ongoing and appears to be deepening, has severely undermined public confidence in the state's judicial system. Interbranch Commission on Juvenile Justice Act, 2009 Pa. Sess. Law 1648 (Aug. 7, 2009).

Against this backdrop, the Pennsylvania Supreme Court's refusal to review Judge Panella's actions in this case is inexplicable. Such a refusal simply compounds the perception that state courts are not level playing fields. Consequently, this case represents an ideal opportunity for this Court to provide the lower courts with guidance regarding the factors to be considered in determining whether and when due process requires recusal or disclosure. In order to preserve public confidence in state judicial systems, this Court should grant certiorari and address these important issues.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM AND DISSENTING MEMORANDUM OF THE SUPERIOR COURT OF PENNSYLVANIA FILED JUNE 4, 2009

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1629 EDA 2008

BARBARA L. GLASOW

Appellant

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL AND HEALTH NETWORK D/B/A ST. LUKE'S OBSTETRIC & GYNECOLOGY ASSOCIATES

Appellee

No. 1734 EDA 2008

BARBARA L. GLASOW

Appellee

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL PHYSICIAN GROUP

Appellant

Appeal from the Order entered May 27, 2008
In the Court of Common Pleas of Lehigh County
Civil No. 2006-C-2210V

Appendix A

BEFORE: BENDER, PANELLA and KELLY, JJ.

MEMORANDUM: **FILED JUNE 4, 2009**

Appellant, Barbara L. Glasow, and Appellees, Joseph M. Skutches, M.D., and St. Luke's Hospital Physician Group, have cross-appealed from the order entered in the Court of Common Pleas of Lehigh County granting Appellees' motion for judgment notwithstanding the verdict.[1] After careful review, we reverse.

On March 23, 2004, Appellant had a doctor's appointment with her gynecologist, Dr. Skutches. At the appointment, Appellant complained of a lump on or near her right breast, which she had been aware of for a few years. After carefully examining the lump, Dr. Skutches diagnosed it as a sebaceous cyst and informed Appellant that the cyst would eventually break open on its own. The doctor told Appellant that if the lump became painful, she could have it lanced by Dr. Schadt, a surgeon whom she had previously seen for other breast issues, but no specific referral was made. Dr. Skutches prescribed an ultrasound for his patient, but did not tell her that it was urgent that she have it done or that the purpose of the ultrasound was to confirm his diagnosis. Appellant never took any steps to have the ultrasound done.

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1. The cross appeals were consolidated, *sua sponte*, by per curiam order dated 9/24/08. For sake of convenience, we will refer to Glasow as Appellant and Skutches as Appellee, and Skutches and St. Luke's Hospital, collectively, as Appellees.

Appendix A

Following her March 23, 2004 appointment with Dr. Skutches, the lump on Appellant's breast continued to get bigger until it finally broke open in the middle of January 2005. Thereafter, Appellant had a biopsy done by Dr. Schadt. On February 19, 2005, Appellant was informed that the lump was cancerous. The week after receiving the bad news, Appellant met with Dr. Schadt, who recommended a full mastectomy of her right breast. Given her slight frame, she was informed that the surgery would be painful and that skin closure could pose a problem.

Following her consultation with Dr. Schadt, Appellant sought the advice of Dr. Schacter, a doctor who specializes in alternative "complementary medicine." For the next couple of months, Appellant was under Schacter's care. On February 15, 2006, almost one full year after the cancer diagnosis, Appellant underwent surgery to remove the breast on which the cancerous lump was located. A second surgery was required and was performed on June 19, 2006. After her wound healed, Appellant underwent several weeks of radiation. In February of 2007, Appellant had four sessions of low dose chemotherapy. A third surgery was performed in May of 2007, and she began taking the prescription drug Herceptin in November of that year.

On August 1, 2006, Appellant filed a civil complaint against Dr. Skutches and St. Luke's Hospital, alleging that Skutches breached the applicable standard of care by not advising her to have a biopsy performed on the lump, which negligence caused a delay in diagnosis of

her cancer resulting in a decreased chance of survival. After fifteen months of discovery, a jury trial commenced on January 14, 2008.

At trial, Appellant introduced the testimony of Dr. Alan Pinshaw, qualified as an expert in obstetrics and gynecology, that Dr. Skutches breached the applicable standard of care by not informing Appellant that a biopsy of her breast mass was required. Appellant also introduced the expert testimony of Dr. Gerald H. Sokol, who testified that had the cancer been diagnosed in March of 2004, Appellant would have had a 60 to 80% chance of survival, but, because of the delay, she only had a 20 to 40% chance of survival.

Appellees offered the expert testimony of Daniel Small, M.D., who opined that because the lump was located in Glasow's breast skin as opposed to breast tissue, Dr. Skutches did not violate the standard of care by not recommending a biopsy. Dr. Small further testified that Appellant's refusal to have mammograms taken of her breast or to undergo the ultrasound prescribed by Dr. Skutches delayed the diagnosis of cancer. Mark Gittleman, M.D., testified that had an ultrasound been performed following the March 23, 2004 visit, findings suggestive of breast cancer would have been noted and, thus, the cancer would have been diagnosed more quickly. Finally, Appellees introduced the expert testimony of David Harris, M.D., who testified that even if the cancer had been diagnosed in March of 2004, Glasow's chance of survival would have only been approximately 20% within a ten-year period, no different

than the chance of survival she had after the cancer was diagnosed in February of 2005.

Following a week long trial, the jury returned a verdict in favor of Appellant for an aggregate amount of $3,973,000 for past loss of earnings, future medical expenses, future loss of earnings, and future non-economic losses. The jury found negligence on the part of both parties, allocating sixty-five percent causal negligence to the Appellees and thirty-five percent to Appellant. Accordingly, Appellant's award was reduced to $2,582,450.

Following the verdict, all parties filed post-trial motions. On May 27, 2008, the trial court entered an order granting Appellees' motion for JNOV, or in the alternative a new trial, finding that the opinions of Appellant's standard of care expert lacked the required degree of medical certainty. All other motions were denied. Subsequent to the order, the trial court issued an opinion on June 3, 2008.

Appellant filed a timely notice of appeal, seeking review of the JNOV entered in Appellees' favor, as well as the denial of her post-trial motions. Appellees filed a timely cross-appeal on June 16, 2008, alleging the trial court erred in denying the motion for JNOV on the ground that Appellant's expert testified concerning an incorrect standard of care.

On appeal, Appellant argues that the trial court erred by granting Appellees' motion for JNOV because:

(1) Appellees waived the issue by failing to object to their standard of care expert's testimony during his direct examination; (2) it was an abuse of discretion for the trial court to grant Appellees' motion for JNOV based on her expert's failing to testify to the requisite degree of medical certainty after it had previously denied their motion for a compulsory nonsuit which raised the same issue; and (3) her standard of care expert expressed his opinions with the requisite degree of medical certainty. Appellant also argues that the trial court erred by charging the jury on comparative negligence, alleging that there was no evidence of negligence on her part. Alternatively, she argues that the trial court should not have charged the jury on comparative negligence because Appellees failed to offer a logical, reasonable, or practical basis for apportionment of negligence. Finally, Appellant argues that the trial court erred by refusing to charge the jury on spoliation of records and by giving the jury an "error of judgment charge." On their cross-appeal, Appellees contend that the trial court should have also granted their alternative motion for JNOV because Appellant's standard of care expert testified concerning the wrong standard of care.

Appellant's first argument is that by failing to object during her standard of care expert's testimony, Appellees waived the issue of whether he testified to the requisite degree of medical certainty. We disagree. Generally, an objection must be made contemporaneously to an error at trial in order to preserve the issue for post-trial relief. "If no objection is made, error which could have been corrected . . . during trial by timely objection may not

constitute a ground for post-trial relief." Pa.R.C.P. 227.1(b)(1), *Note.* Here, the issue raised by Appellees in their post-trial motion was not an issue that could have been corrected during trial. If, as Appellant alleges,[2] Appellees' motion for JNOV had been based on an evidentiary ruling, the issue would have been waived for failure to object because such error could have been rectified at trial. However, Appellees' motion was based not on an evidentiary ruling, but, rather, on the allegation that Appellant's evidence of negligence, including Dr. Pinshaw's testimony, was insufficient to show that Dr. Skutches breached the applicable standard of care. A defendant does not have to object to ensure that an opposing party's witness testifies with the certainty required to establish a prima facie case of medical malpractice. Accordingly, we find that Appellees did not waive the issue.[3] ***See Griffin v. Univ. of Pitt. Med. Ctr.***, 950 A.2d 996 (Pa. Super. 2008) (addressing argument that expert's opinions were not offered with required degree of medical certainty despite no mention in opinion of whether defendants objected to the testimony at trial); ***Corrado v. Thomas Jefferson Univ. Hosp.***, 790 A.2d 1022 (Pa. Super. 2001) (finding issue of

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2. (*See* Appellant's Brief, at 20).

3. We note that Appellant cites no case authority for the proposition that a defendant must object contemporaneously to expert testimony as lacking the requisite certainty in order to preserve the right to request a nonsuit based on the plaintiff's failure to establish a prima facie case of medical malpractice. Rather, Appellant merely cites cases which echo the general sentiment expressed in Pa.R.C.P. 227.1(b)(1), *Note.*

whether trial court erred in considering evidence offered by defendants during plaintiff's case in chief waived for failure to object, while addressing claim expert did not testify with required degree of medical certainty despite no mention in opinion of whether defendants objected to the testimony at trial).

Appellant's next argument is that it was an abuse of discretion for the trial court to grant Appellees' motion for JNOV based on her expert's testimony not being offered with sufficient medical certainty, after it had previously denied Appellees' motion for a compulsory nonsuit which raised the same issue during trial. We disagree. This Court "will reverse a trial court's grant or denial of a judgment notwithstanding the verdict [ ] when we find an abuse of discretion[.]" ***Campisi v. Acme Markets, Inc.***, 915 A.2d 117, 119 (Pa. Super. 2006) (citation omitted). "An abuse of discretion exists when the trial court has rendered a judgment that is manifestly unreasonable, arbitrary, or capricious, has failed to apply the law, or was motivated by partiality, prejudice, bias, or ill will." ***Cave v. Wampler Foods, Inc.***, 961 A.2d 864, 868 (Pa. Super. 2008) (citation omitted). Here, we find no evidence that the trial court was motivated by partiality, prejudice, bias, or ill will simply because it initially denied Appellees' motion for compulsory nonsuit during trial when it did not have the opportunity to review the transcript of Dr. Pinshaw's testimony, and then subsequently granted the motion

for JNOV after trial when it was able to consider more carefully the substance of the expert's testimony.[4]

Appellant's next argument is that the trial court erred in finding that her standard of care expert's testimony lacked the requisite degree of medical certainty. After careful review, we agree.

> A [judgment n.o.v.] can be entered upon two bases: (1) where the movant is entitled to judgment as a matter of law; and/or, (2) the evidence was such that no two reasonable minds could disagree that the verdict should have been rendered for the movant. When reviewing a trial court's denial of a motion for [judgment n.o.v.], we must consider all of the evidence admitted to decide if there was sufficient competent evidence to sustain the verdict . . . . Concerning any questions of law, our scope of review is plenary. Concerning questions of credibility and weight accorded the evidence at trial, we will not substitute our judgment for that of the finder of fact . . . . A [judgment n.o.v.] should be entered only in a clear case.

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4. Again, we note that Appellant does not cite any case in which an appellate court found an abuse of discretion based on a trial court's denying a motion for compulsory nonsuit then subsequently granting a motion for JNOV raising the same issue.

Cruz v. Northeastern Hosp., 801 A.2d 602, 607 (Pa. Super. 2002) (citation omitted). This Court has made clear that "[t]he entry of judgment notwithstanding the verdict (JNOV) is a drastic remedy; a court cannot lightly ignore the findings of a duly selected jury." ***Burton-Lister v. Siegel, Sivitz and Lebed Associates***, 798 A.2d 231, 236 (Pa. Super. 2002), *appeal denied*, 808 A.2d 568 (Pa. 2002). Finally,

> [I]n order to determine the propriety of a decision granting judgment n.o.v. we must determine whether there was sufficient competent evidence to sustain the verdict, granting the verdict winner the benefit of every reasonable inference that can reasonably be drawn from the evidence and rejecting all unfavorable testimony and inferences. We will not reverse the trial court's decision absent the demonstration of either an abuse of discretion or an error of law.

Gorski v. Smith, 812 A.2d 683, 698 (Pa. Super. 2002) (citation omitted), *appeal denied*, 856 A.2d 834 (Pa. 2004).

To establish a prima facie case of medical malpractice, Appellant was required to offer expert testimony concerning the standard of care to which Dr. Skutches was required to adhere. "[W]here the circumstances surrounding the malpractice claim are beyond the knowledge of the average layperson . . . the plaintiff is [ ] required to present an expert witness who

will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." ***Vicari v. Spiegel***, 936 A.2d 503, 510 (Pa. Super. 2007) (citations and internal quotation marks omitted)

> In determining whether the expert's opinion is rendered to the requisite degree of certainty, we examine the expert's testimony in its entirety. That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty. Accordingly, an expert's opinion will not be deemed deficient merely because he or she failed to expressly use the specific words, reasonable degree of medical certainty.

Id. (citations and internal quotation marks omitted). This Court has held that "reasonable degree of medical certainty" requires more than offering an opinion as to what was more likely than not. ***See Corrado, supra*** at 1031 (finding expert did not testify with requisite degree of medical certainty when he testified that "more likely than not in my opinion [the defendant doctor] deviated from the standard of care.").

Here, during his direct examination, Appellant's standard of care expert, Dr. Pinshaw, was asked to describe the routine he generally follows when retained

to testify as an expert in medical malpractice cases. The witness described the process he normally employs, and concluded by stating "I try and reach a conclusion that speaks to a reasonable medical certainty, which means more likely than not[.]" (N.T., 1/16/08, at 103). Appellant's counsel then asked the expert: "Well, is it more likely than not, or is it to a reasonable medical certainty?" (***Id.***). The expert responded: "It's the same thing in my opinion." (***Id.***).

Following this line of questioning, Appellant's counsel directed his expert's testimony to the instant case. "With regard to the opinions you rendered in this case, can you tell me what opinions you rendered and why you rendered them?" (***Id.***). The expert responded: "I had in the instance, one central opinion, and that is that on March 23, 2004, when Barbara Glasow complained of a lump in her breast and sought medical attention, as a consequence of that encounter, a biopsy — and I'll explain what that is in a moment — **needed** to be taken." (***Id.***) (emphasis added). He further explained that

> This opinion is based on the fact that for many years now, certainly longer than I've been in practice, it has been known that examining a breast lump, although you may have an idea what you think it is and that it is malignant or nonmalignant, that's the bottom line.

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> You can form an opinion if you wish, but you are **mandated** to check the opinion by testing the tissue.
>
> We all have our suspicions. "I don't think this is malignant" or "This looks malignant." You **need** to go to the tissue and have a look at it . . .

(***Id***, at 105) (emphasis added). At another point in the testimony, the expert asserted that "[o]n that day, that lesion **needed** to be [biopsied] . . . That abnormality **needed** to be biopsied." (***Id.*** at 111) (emphasis added). Appellant's counsel later asked Dr. Pinshaw: "If you don't tell that to a patient that you need to get a biopsy, is that a violation of the standard of care?" The expert definitively responded: "It is." (***Id.*** at 113). Finally, the expert was asked "do you firmly hold those opinions, the ones you testified to," to which he responded, "Yes." (***Id***. at 115).

After carefully reviewing Dr. Pinshaw's testimony in its entirety, we conclude that the trial court erred in finding that the expert's opinions regarding the standard of care were not offered with the requisite degree of medical certainty. Although the testimony includes a definition of medical certainty at odds with established case law, a complete reading of the testimony establishes that his opinion concerning the need for a biopsy of Appellant's breast tissue when Dr. Skutches

examined her on 3/23/04 was offered with sufficient medical certainty.[5] ***See Griffin, supra***, at 1000 ("That an expert may have used less definite language does not render his entire opinion speculative if at some time during his testimony he expressed his opinion with reasonable certainty."). Just as the mere utterance of the magic words "reasonable degree of medical certainty" does not automatically render expert testimony legally sufficient, ***see Griffin, id.***, at 1001-02, we find that the mere fact Dr. Pinshaw prefaced his testimony with a faulty definition of "reasonable degree of medical certainty" did not render the remainder of his testimony legally insufficient. Rather, we find that the expert's repeated use of definitive terms with regard to the necessity for a biopsy of Appellant's breast lump clearly establishes that his opinions were offered with sufficient medical certainty. Therefore, we vacate the trial court's order granting Appellees' motion for JNOV.

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5. The trial court asserts that after Dr. Pinshaw gave his opinion as to the definition of reasonable degree of medical certainty, "[a]ll opinions that followed, no matter how strongly worded, were based on an inappropriate degree of certainty. Dr. Pinshaw limited his testimony to 'more likely than not' by giving his own meaning to the phrase 'reasonable degree of medical certainty.'" (Trial Ct. Op.,. 6/3/08, at 12). We disagree. When addressing whether the standard of care called for a biopsy, Dr. Pinshaw stated, *inter alia*, that a biopsy was "mandated." (***See*** N.T., 1/16/08, at 105). It is simply illogical to conclude that Dr. Pinshaw intended to qualify the term "mandated" with his definition of medical certainty, more likely than not. Something either is or isn't mandated; it cannot be "more likely than not mandated." Accordingly, we disagree with the trial court's logic.

Both the trial court and Appellees rely on ***Corrado***, ***supra***, in support of the JNOV. We find that the case is distinguishable on the facts. In ***Corrado***, the plaintiff's standard of care expert repeatedly qualified his responses to specific questions concerning whether the defendant doctor breached the standard of care with the phrase "more likely than not." ***See Corrado***, ***supra*** at 1031 ("more likely than not in my opinion he deviated from the standard of care;" "more likely than not [the decedent] would have responded to treatment."). On appeal, this Court found that the expert did not express the requisite degree of medical certainty. ***See id.*** Here, to the contrary, Dr. Pinshaw only used the phrase "more likely than not" when asked in the abstract what he believed to be the definition of reasonable degree of medical certainty. When he was subsequently asked specific questions concerning whether Dr. Skutches breached the standard of care by failing to biopsy the lump, Pinshaw offered certain, definitive statements in the affirmative. (***See*** N.T., 1/16/08, at 103, 105, 113). Accordingly, ***Corrado*** is not controlling.

Our task is not complete, as there are several other issues raised before us which we need resolve. Appellant's next argument is that the jury should not have been charged on comparative negligence because Appellees did not offer any evidence of negligence on her part. We disagree.

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The standard of review of a jury charge is well settled:

> Our standard of review regarding jury instructions is limited to determining whether the trial court committed a clear abuse of discretion or error of law which controlled the outcome of the case.
>
> Error in a charge is sufficient ground for a new trial if the charge as a whole is inadequate or not clear or has a tendency to mislead or confuse rather than clarify a material issue. A charge will be found adequate unless the issues are not made clear to the jury or the jury was palpably misled by what the trial judge said or unless there is an omission in the charge which amounts to a fundamental error. In reviewing a trial court's charge to the jury we must look to the charge in its entirety.

Underwood ex rel. Underwood v. Wind, 954 A.2d 1199, 1204 (Pa. Super. 2008) (citation omitted).

> The purpose of a jury charge is to clarify the legal principles at issue. A jury instruction will be upheld if it accurately reflects the law and is sufficient to guide the jury in its deliberations. A trial judge is bound to charge the jury only on the law applicable to the factual parameters of a particular case and it

> may not instruct the jury on inapplicable legal issues.

Cruz, supra at 611 (citations omitted).

The law with regard to comparative negligence is equally well settled.

> **[A]ny evidence** of contributory negligence mandates submission of the issue to the jury. Nevertheless, the burden to establish the plaintiff's conduct as a contributing factor in his injury rests with the defendant, who must show both the negligence of the conduct alleged and the causal relationship of that conduct to the injuries for which damages are sought. Our Courts have distilled these elements as follows:
>
> > Contributory negligence is conduct on the part of a plaintiff which falls below the standard [of care] to which he should conform for his own protection and which is a legally contributing cause, cooperating with the negligence of the defendant, in bringing about the plaintiffs harm. Contributory fault may stem either from a plaintiff's careless exposure of himself to danger **or from his failure to exercise reasonable diligence for his own protection.**

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Angelo v. Diamontoni, 871 A.2d 1276, 1280-81 (Pa. Super. 2005) (citations omitted) (emphasis added).

Here, we find that the trial court did not err in charging the jury on comparative negligence. At trial, Appellees offered the testimony of Dr. Daniel Small that "mammograms are extremely effective in diagnosing breast cancer." (N.T., 1/16/08, at 161). There was also testimony that due to the pain they caused her, Appellant stopped having mammograms performed in April of 2001. (***See*** N.T., 1/15/08, at 50, 104). Finally, there was expert testimony that previous mammograms taken on Appellant's breast were "quite helpful,' that "they were still able in 2001 to get perfectly good pictures [of] her left breast," and that "[i]f mammograms had been done on a yearly basis, the way that they're recommended [for] women over the age of 40, this breast cancer would have been diagnosed in my opinion." (**See** N.T., 1/16/08, at 162, 163, 161). Appellees also adduced evidence that had an ultrasound been performed the cancer would have been diagnosed, (***see*** N.T., 1/16/08, at 165, 166, 198), and that Appellant failed to have an ultrasound performed despite discussing the need for the procedure with Dr. Skutches in January of 2003, (**see** N.T., 1/15/08, at 104-07), and despite the fact that he prescribed one during his March 23, 2004 examination of Appellant's breast.[6] (***See id.*** at

6. The theory of Appellant's case was a decreased chance of survival from the time she was examined by Dr. Skutches on March 23, 2004, to the time the cancer was finally diagnosed in February of 2005. Accordingly, the evidence adduced at trial (Cont'd)

64; N.T., 1/18/08, at 48, 49). Although Appellant presented evidence to counter Appellees' claim that she was negligent, including Dr. Skutches' admission that he did not inform her during the 3/24/04 appointment that the purpose of the ultrasound was to rule out cancer, (***see*** N.T., 1/18/08, at 71), and her testimony that the purpose of the ultrasound prescription was to determine whether her insurance carrier would cover the test, (***see***

(Cont'd)

concerning Appellant's decision to initially delay mastectomy and chemotherapy, and, instead, undergo "complementary medicine," was irrelevant for purposes of contributory negligence. While Appellees do not allege in their brief that Appellant's negligence included her decision to delay surgery and chemotherapy, (***see*** Appellees' Brief, at 29), we note that in Defense counsel's closing arguments, he clearly argued to the jury that Appellant was negligent for her treatment decisions after the cancer diagnosis. (***See*** N.T., 1/18/08, at 187-88). On appeal, Appellant does not allege that the trial court erred in admitting the evidence concerning her post-diagnosis treatment decisions and that a new trial should be granted on that basis; rather, Appellant simply notes in her brief that such evidence was irrelevant, and then incorrectly asserts that Appellees offered no other evidence of contributory negligence. (***See*** Appellant's Brief, at 36). Accordingly, the issue is waived. ***See*** Pa.R.A.P. 2119(a); ***Lackner v. Glosser***, 892 A.2d 21, 29-30 (Pa. Super. 2006) ("arguments which are not appropriately developed are waived."). We also note that Appellant's counsel did not object during Defense counsel's closing argument. Accordingly, the issue is also waived on that basis, as this is the type of error which could have been corrected by the trial court.. ***See*** Pa.R.C.P. 227.1(b)(1), *Note* ("If no objection is made, error which could have been corrected . . . during trial by timely objection may not constitute a ground for post-trial relief.").

N.T., 1/15/08, at 64, 107), the trial court was required to charge the jury on the issue because Appellees offered evidence of contributory negligence. Accordingly, the trial court did not err in charging the jury on comparative negligence.

Appellant relies upon ***Diamontoni***, ***supra***, for her contention that there was no evidence of negligence on her part. In that case, a twenty-three year old man went to his doctor complaining of vomiting, blurred vision, dry mouth, lightheadedness, and inability to work. ***Id.*** at 1278. The doctor noted that the patient had a family history of diabetes and suggested that he obtain a fasting blood draw, but did not prescribe a random blood sugar screening. ***Id.*** The doctor diagnosed the patient with influenza. ***Id.*** Less than one month after this initial visit, the patient returned to his doctor's office complaining of nausea and vomiting. ***Id.*** This time, the doctor diagnosed the patient with gastroenteritis and again sent him home, where he died the following day of diabetic ketoacidosis. ***Id.*** At the medical malpractice trial which followed, the court charged the jury on comparative negligence. ***Id.*** The jury found that the plaintiff was more than 50% contributorily negligent. ***Id.*** On the plaintiff's appeal, the doctor argued that the decedent's failure to monitor his own health coupled with his failure to obtain a fasting blood draw justified the charge. ***Id.*** at 1281. This Court disagreed and vacated the judgment, finding that because the doctor had not attached any urgency to his suggestion that plaintiff obtain a fasting blood draw, the plaintiff had not been contributorily negligent for failing to have the procedure done. ***Id.*** at 1282.

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The instant case is distinguishable from ***Diamontoni.*** Here, Appellant did not go to a doctor for an unknown illness and then simply fail to undergo a procedure suggested by her doctor. Rather, Appellant went to her doctor for the specific purpose of determining whether a lump on her breast was cancerous, and, after being informed by her doctor that he did not think it was cancerous but that she should nevertheless have an ultrasound, she opted against having the test done. Although Dr. Skutches did not specifically tell her that the purpose of the ultrasound was to confirm his diagnosis, Appellant was aware that ultrasounds are relied upon to check for cancer, the specific disease she was worried about. Additionally, Appellant had consistently refused to undergo mammograms and ultrasounds prior to her March 23, 2004 visit with Appellee, tests which could have helped diagnose her disease while still in its early stages. This evidence was sufficient for the charge on comparative negligence. Accordingly, Appellant's argument is without merit.

Appellant next argues that the charge on comparative negligence was improper because Appellees offered no expert testimony regarding the extent to which her alleged negligent conduct contributed to the delay in her cancer diagnosis. We disagree. At trial, Appellant's own causation expert testified that the delay in diagnosis resulted in her chance of survival dropping from 60-80% to 20-40%. (***See*** Appellant's Exhibit 7 D, Video Deposition of Gerald H. Sokol, M.D., 1/12/08, at 02334-02336) (played for jury

at trial on 1/16/08 and 1/17/08). Although Appellees offered evidence that the delay in diagnosis did not result in any decreased chance of survival, (***see*** N.T., 1/17/08, at 148), they were also free to argue the alternative theory that if there was a decreased chance of survival, it was due to Appellant's own negligence. As the trial court aptly explained, Appellees "claimed that the delay in diagnosis created no meaningful difference in [Appellant's] prognosis, but, if it did, the [Appellant] herself must share the blame." (Trial Ct. Op., 6/3/08, at 17). We find that the jury could consider the causation evidence offered by Appellant in finding that her own negligence contributed to her decreased chance of survival.

Appellant next argues that the jury should not have been charged on contributory negligence because Appellees failed to provide a logical, reasonable, or practical basis for apportionment of negligence. In support of her argument, Appellant relies on product liability cases in which this Court has found that an expert is required to apportion causation. (***See*** Appellant's Brief, at 36-37) (citing ***Lee v. Pittsburgh Corning Corp.***, 616 A.2d 1045 (Pa. Super. 1992); ***Martin v. Owens-Corning***, 528 A.2d 947 (Pa. 1987); ***Glomb v. Glomb***, 530 A.2d 1362 (Pa. Super. 1987), *appeal denied*, 538 A.2d 876 (Pa. 1988)). However, allocation of liability under our comparative negligence statute[7] is an entirely distinct issue from apportionment of harm to causes under the Restatement (Second) of Torts. In fact, our

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7. 42 Pa.C.S.A. § 7102.

research has revealed no legal authority supporting Appellant's contention that Appellees were required to produce expert testimony to allow the jury to allocate negligence. Rather, it seems clear that under our comparative negligence statute, it is within the jury's province as finder of fact to weigh all evidence of negligence and allocate liability accordingly.

Appellant's next argument is that the trial court erred by refusing to charge the jury on spoliation of records. Specifically, Appellant contends that the trial court should have charged the jury in accordance with Pa. Standard Jury Instruction 5.06(CIV), which states in part: "if you find that there was an intentional alteration or destruction of medical records by the defendant[s] in this case, and that there has been no satisfactory explanation for the alteration or destruction, you may infer that the records or portions of records so altered or destroyed would have been unfavorable to the defendant[s]." We disagree.

"When examining jury instructions, our scope of review is to determine whether the trial court committed a clear abuse of discretion or an error of law controlling the outcome of the case." ***Gorski***, ***supra*** at 697. As noted above, "[t]he purpose of a jury charge is to clarify the legal principles at issue. A jury instruction will be upheld if it accurately reflects the law and is sufficient to guide the jury in its deliberations." ***Cruz***, ***supra*** at 611 (citations omitted).

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The basis for the requested spoliation charge was evidence adduced at trial that subsequent to Dr. Skutches' examination of Appellant, he made a note in his records that he recommended Appellant see Dr. Schadt. The jury was clearly apprised that the transcription occurred after Dr. Skutches learned that Appellant's breast lump had been diagnosed as malignant cancer. (***See*** N.T., 1/18/08, at 52). The evidence also clearly indicated that Dr. Skutches wrote the note with a different colored pen than the one he used to make the original entry, (***see id.*** at 64), that he circled the note, (***see id.*** at 52), and that the note did not overwrite or obscure the original entry in any way. (***See id.*** at 61). Accordingly, the only thing that was altered was a blank piece of paper; thus, there was simply no need for the jury to infer anything. We therefore find that the trial court did not commit an abuse of discretion by refusing to charge the jury in accordance with Pa. Standard Jury Instruction 5.06(CIV).

Appellant's final argument is that the trial court committed an abuse of discretion when it charged the jury that "[t]o be responsible for the harm to [Appellant], [Appellee] must make more than a mere error in judgment. The error must be negligent, and the negligence must be an actual cause of harm to [Appellant]." (N.T., 1/18/08, at 209). Appellant argues that the charge was error because Pa. Standard Jury Instruction 11.01 does not include "a charge on the professional judgment exception[.]" ***See*** Pa. Standard Jury Instruction 11.01, subcommittee notes. We disagree.

Although the trial court did not follow this standard jury instruction, it was not required to do so. Our Supreme Court "has never adopted the Pennsylvania Suggested Standard Jury Instructions, which exist only as a reference material available to assist the trial judge and trial counsel in preparing a proper charge." ***Jeter v. Owens-Corning Fiberglas Corp.***, 716 A.2d 633, 636 (Pa. Super. 1998). (citing ***Commonwealth v. Smith***, 694 A.2d 1086, 1094 n.11 (Pa. 1997)). In fact, "[t]his Court has granted trial courts broad discretion in phrasing a jury charge. Our main concern is that the charge clearly, adequately, and accurately presents the law to the jury for its consideration." ***Commonwealth v. Collins***, 810 A.2d 698, 701 (Pa. Super. 2002) (citations omitted). Accordingly, Appellant is not entitled to relief simply because the trial court deviated from the proposed standard jury instruction.

Appellant also relies on ***Gunn v. Grossman***, 748 A.2d 1235 (Pa. Super. 2000), *appeal denied*, 764 A.2d 1070 (Pa. 2000), for the proposition that the trial court should not have charged the jury on "error in judgment." In ***Gunn***, this Court found that despite the trial court's refusal to charge the jury on "error in judgment," the defendant doctor was not entitled to a new trial. However, contrary to Appellant's representation of the case, this Court did not decree that trial courts should never charge a jury on "error in judgment." Rather, it found that the charge which had been given sufficiently informed the jury about the law of negligence and, thus, that the appellant doctor was not entitled to a new trial based on the court's refusal to charge the jury on "error

in judgment." ***Id.*** at 1244. Therefore, ***Gunn*** does not compel us to find that the trial court erred by charging the jury on "error in judgment."

In ***Havasy v. Resnick***, 609 A.2d 1326 (Pa. Super. 1992), this Court expressly approved the "error in judgment" jury charge. ***Id.*** at 1335-36. Since ***Havasy*** was decided, neither this Court nor our Supreme Court has overruled ***Havasy*** and found that the charge amounts to *per se* error. Admittedly, this Court has "expressed reservations about the continued vitality of" the charge. ***See Tindall v. Friedman***, 2009 WL 763387, *15 (Pa. Super. 2009). Specifically, we have noted that "except in the rarest of cases, the 'error in judgment' charge is much more likely to confuse than clarify." ***D'Orazio v. Parlee & Tatem Radiologic Associates, Ltd.***, 850 A.2d 726, 729 (Pa. Super. 2004). Nevertheless, this Court has repeatedly affirmed trial courts' use of the charge. ***See Blicha v. Jacks***, 864 A.2d 1214, 1219-20 (Pa. Super. 2004); ***King v. Stefenelli***, 862 A.2d 666, 671 (Pa. Super. 2004) (noting "[t]he law has long been that a physician is not liable for an error of judgment if that physician employs the required judgment and care"); ***Schaaf v. Kaufman***, 850 A.2d 655, 666 (Pa. Super. 2004), *appeal denied*, 872 A.2d 1200 (Pa. 2005). Unless and until our Supreme Court finds otherwise, we are compelled to follow the long line of cases which have affirmed trial courts' use of the "error in judgment" charge.

Although we have found that the trial court's charge was not error simply because it mentioned "error in

judgment," we still must determine whether, as given, "the charge clearly, adequately, and accurately present[ed] the law to the jury for its consideration." ***Collins***, ***supra*** at 701. Here, in addition to the "error in judgment" point, the trial court charged the jury, *inter alia*, that:

> [P]rofessional negligence consists of a negligent, careless, or unskilled performance by a physician of the duties imposed [on] him by the professional relationship with the patient. It is negligence when a physician shows a lack of proper care and skill in the performance of a professional act. A physician must have the same knowledge and skill and use the same care normally used in the medical profession.
>
> A physician whose conduct does not meet the professional standard of care is negligent. A physician must also keep informed of the contemporary developments in the medical profession, and must use current skills and knowledge.

(N.T., 1/18/08, at 210). Read as a whole, we find that the charge accurately explained that to find Dr. Skutches liable for negligence, the jury had to conclude that he deviated from the appropriate standard of care. Accordingly, the trial court's jury charge did not amount to an abuse of discretion.

Having disposed of all of Appellant's issues on appeal, we now turn to Appellees' cross-claim that the trial court should have granted their motion for JNOV because Appellant's standard of care expert testified concerning the wrong standard of care. Specifically, Appellees argue that the expert testified about the standard of care applicable to surgeons rather than the standard of care applicable to doctors who specialize in obstetrics and gynecology. Appellant argues that the issue was waived by Appellees' failure to object during the expert's testimony. We disagree that the issue was waived, as Appellees properly preserved the issue by raising the sufficiency of Appellant's evidence in their post-trial motion and then addressing the issue at length in their brief in support of the motion.[8] However,

8. We note our astonishment that the trial court found this issue waived based on Appellees' failure to object when the testimony was being offered, yet found that the issue of whether the expert's testimony was offered with sufficient certainty was not waived for lack of objection at trial. (*See* Trial Ct. Op., 6/3/08, 14-15). Although Appellant did not specifically allege in her Brief in Opposition to Appellees' Motions for Post-Trial Relief that the issue regarding the certainty of Dr. Pinshaw's testimony was waived due to Appellees' failure to object, as she did with regard to the proper standard of care testimony issue, Appellant certainly alluded to waiver by noting that "the trial judge, during the testimony of Dr. Pinshaw, was never alerted to any claim that the testimony of Appellant's expert was insufficient as a matter of law." (*See* Appellant's Brief in Opposition to Appellee's Motion for Post-Trial Relief, at 8). Furthermore, in her answer to Appellees' Motion for Relief, Appellant alleged that "[Appellees] seek to allege unspecified

(Cont'd)

we find that the testimony concerned the proper standard of care.

At trial, Appellant's expert was qualified as an expert in obstetrics and gynecology. During his testimony, the expert was asked to explain the basis for his opinion. The expert responded: "this is based on a very old and well-established surgical principle that a breast mass —" (N.T., 1/16/08, at 104). Before the expert could finish his sentence, Defense counsel lodged an objection, which was sustained. Thereafter, the expert

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(Cont'd)

other reasons as to why their motion should be granted, however, to the extent such objections were not raised at the time of trial, same are waived . . . It is specifically denied that [Appellees] preserved their claims with timely Motions and/or **Trial Objections** as apparently some [Appellees] Objections are being raised for the first post trial [sic]." (***See*** Appellant's Opposition to Appellees' Motion For Post Trial Relief, Cross-Motion for Judgment Notwithstanding the Verdict and Cross-Motion for Post Trial Relief Pursuant to Rule 227.1(c), at ¶¶ 6-7) (emphasis added). Therefore, it seems clear that the issue of whether Appellees waived their claim regarding the certainty of Appellant's expert testimony was brought to the trial court's attention and that it either implicitly rejected the issue or simply chose not to address it. In any event, we find that the ultimate issue addressed in both claims was identical: whether Appellant's evidence, including Dr. Pinshaw's testimony, established a prima facie case of medical malpractice. As we have already explained, because neither claim was premised on alleged error in the trial court's admitting the testimony, Appellees were not required to contemporaneously object to the testimony in order to preserve either claim. ***See*** above at 7-9.

rephrased his answer, explaining the basis for his opinion without any further reference to surgical principles. We find that this lone reference to surgical principles does not support Appellees' argument that the expert testified to the standard of care applicable to surgeons rather than the relevant standard of care applicable to obstetrician gynecologists. Accordingly, we reject Appellees' claim.

Order reversed. Case remanded to trial court with instructions to enter judgment in favor of Appellant for the damages determined by the jury, reduced by the amount of contributory negligence allocated to Appellant. Jurisdiction relinquished.

Bender, J. files a Dissenting Memorandum.

Appendix A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1629 EDA 2008

BARBARA L. GLASOW

Appellant

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL AND HEALTH NETWORK D/B/A ST. LUKE'S OBSTETRIC & GYNECOLOGY ASSOCIATES

Appellee

No. 1734 EDA 2008

BARBARA L. GLASOW

Appellee

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL PHYSICIAN GROUP

Appellant

Appeal from the Order entered May 27, 2008
In the Court of Common Pleas of Lehigh County
Civil No. 2006-C-2210V

Appendix A

BEFORE: BENDER, PANELLA and KELLY, JJ.

DISSENTING MEMORANDUM BY BENDER, J.:
FILED JUNE 4, 2009

I respectfully dissent. After considering the totality of his testimony, I conclude that Appellant's standard of care expert, Dr. Pinshaw, failed to express his opinion to the requisite degree of medical certainty, thereby creating a void in Appellant's prima facie case and entitling Appellees to judgment notwithstanding the verdict. Upon commencing his testimony, on direct examination, Dr. Pinshaw indicated that his opinions were submitted with a "reasonable degree of medical certainty"; however, critically, he revealed his misunderstanding of that requisite legal standard by defining it as "more likely than not." ***See*** N.T. Trial, 1/16/08, at 103. Specifically, Dr. Pinshaw stated initially that, in each case, he tries to "reach a conclusion that speaks to a reasonable medical certainty, which means more likely than not", and he reiterated his understanding that both the "reasonable medical certainty" and "more likely than not" standards were "the same thing". ***Id.*** Thus, I agree with the trial court that every opinion thereafter voiced by Dr. Pinshaw (i.e., that Dr. Skutches breached the applicable standard of care by failing to order a biopsy) was, actually, expressed only to a more likely than not degree of medical certainty. An expert opinion rendered to a more likely than not degree of certainty is insufficient in a medical malpractice case. ***Corrado v. Thomas Jefferson Univ. Hosp.***, 790 A.2d 1022, 1031 (Pa. Super. 2001).

APPENDIX B — OPINION OF THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA, CIVIL DIVISION FILED JUNE 3, 2008

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA CIVIL DIVISION

Case No.: 2006-C-2210V

BARBARA GLASOW,

Plaintiff,

vs.

JOSEPH M. SKUTCHES, M.D., and ST. LUKE'S PHYSICIAN GROUP,

Defendants.

OPINION

CAROL K. McGINLEY, J.

Joseph M. Skutches, M.D. and St. Luke's Hospital and Health Network request judgment not withstanding the verdict, or in the alternative, a new trial. Barbara Glasow filed a Cross-Motion for Judgment Not Withstanding the Verdict and Cross-Motion for Post-trial Relief.

Appendix B

Following jury trial in this medical malpractice case from January 14, 2008 to January 18, 2008, the jury found Defendants 65% negligent, and Plaintiff 35% contributorily negligent. The verdict of $3,973,000, if molded for the Plaintiff's contributory negligence, results in damages totaling $2,582,450.

FACTS

Ms. Glasow scheduled an appointment with her gynecologist, Dr. Skutches, in order to have a lump on the edge of her breast examined. At that appointment, on March 23, 2004, Dr. Skutches examined the lump by looking at it carefully, feeling the breast and the lump. (N.T. January 15, 2008, pp. 60-61). Dr. Skutches determined that the lump was a sebaceous cyst and told Ms. Glasow there was nothing to worry about, that it would eventually break and reveal white cheesy matter. (N.T. January 15, 2008, p. 61). Dr. Skutches explained that she could have it lanced by Dr. Schadt, a surgeon who she had previously seen for other breast issues, if the lump was uncomfortable, but no specific referral was made for Ms. Glasow to see Dr. Schadt. (N.T. January 15, 2008, p. 63).

Ms. Glasow had previously voiced her refusal to have mammograms done after feeling she was physically unable to maneuver in the mammography machine, which resulted in a pinching of her spinal cord. (N.T. January 15, 2008, p. 50). A notation had been made in her file during her prior annual exam in January of 2003, for a breast ultrasound next year. (N.T. January 15, 2008, p. 107).

Appendix B

During the March 23, 2004 appointment, Dr. Skutches gave Ms. Glasow a prescription for an ultrasound of her breasts. (N.T. January 15, 2008, p. 64). However, Ms. Glasow did not take any steps to have the ultrasound done. (N.T. January 15, 2008, p. 152). An ultrasound would have revealed that the diagnosis of sebaceous cyst was questionable. (N.T. January 16, 2008, pp. 165, 166, 198); (Defendant's Exhibit 9, Videotaped Deposition of Mark Gittleman, M.D., January 17, 2008, pp. 30-31, 33-35).

Following the March 23, 2004 appointment, the lump continued to get bigger and in the middle of January 2005, the lump broke open and was bloody, raw and weepy. (N.T. January 15, 2008, pp. 65-66). Ms. Glasow made an appointment with Dr. Schadt who biopsied the lump. On February 19, 2005, Ms. Glasow received the pathology results that the lump was poorly differentiated adenocarcinoma, i.e. cancer. (N.T. January 15, 2008, p. 69).

The following week, Ms. Glasow had a follow-up meeting with Dr. Schadt who recommended a full mastectomy on the right side. (N.T. January 15, 2008, p. 75). In addition, Ms. Glasow had a consultation with Dr. Ansanelli, a breast surgeon with a specialty in lasers and Dr. Elliot Friedman, an oncologist.

Ms. Glasow did not accept any of the recommendations from the time she was diagnosed in February of 2005 through August 2005. (N.T. January 15, 2008, p. 154). The only treatment she accepted was

with Dr. Schachter, a doctor of complementary medicine. (N.T. January 15, 2008, p. 154).

Although surgery had been recommended soon after the diagnosis of cancer, Ms. Glasow did not choose to undergo surgery until February 15, 2006, a year after the diagnosis. (Plaintiff's Exhibit 7 D, Video Deposition of Gerald H. Sokol, M.D., January 12, 2008, p. 02297). She had a second surgery on June 19, 2006. (*Id.* at 02311). After the wound healed she had a course of several weeks of radiation at the Cancer Treatment Centers of America. (N.T. January 15, 2008, pp. 90-91). In February of 2007, Ms. Glasow had four sessions of low dose chemotherapy. A third surgery was performed in May of 2007. (N.T. January 17, 2008, p. 145). Ms. Glasow began Herceptin in November of 2007. (N.T. January 15, 2008, p. 156).

Plaintiff provided the following causation testimony from her expert, Gerald H. Sokol, M.D.:

> If it had been diagnosed, and indeed this was a movable lesion as Ms. Glasow and the defendant physician, Dr. Skutches have testified, then this could well have been T-1 or a T-2 lesion without lymph nodes being involved. That means at that time she could well have had a cure rate anywhere from 60 to 80 plus percent.
>
> I understand that the nature of the lesion is somewhat nebulous, but if indeed that is the

case, then she had a certainly a better than even chance of being cured of her cancer with standard treatment, with just lumpectomy and radiation therapy.

Because it was estrogen receptor positive, she might have received — she might have received any of the agents that she ultimately took, Femara, Tamoxifen or Raloxifene, Arimidex, agents that she sought during the course of her disease. And she still likely would have had a better than even chance of being cured.

As it is now, of course, with disease in the liver and bone, she's not a candidate for cure. And when she presented with her cancer after the alleged 11 month delay, she had had an already very clear cut skin invasion and an invasion actually into the chest wall itself.

So at that time, even without knowing the subsequent history, the prognosis for curative treatment dropped to perhaps 20, 30, at best 40 percent. So she lost a significant chance for survival.

(Plaintiffs Exhibit 7 D, Video Deposition of Gerald H. Sokol, M.D., January 12, 2008, pp. 02334-02336).

Dr. Daniel Small, M.D. testified on behalf of Defendants. He testified that Plaintiff's reluctance or

refusal to have mammograms or the ultrasound prescribed by Dr. Skutches conducted delayed the diagnosis of breast cancer. (N.T. January 16, 2008, pp. 161, 164, 165, 166, 198).

Similarly, Dr. Mark Gittleman, M.D. testified on behalf of Defendants and also opined, "that had an ultrasound been performed following that March 2004 visit with Dr. Skutches, that findings suggestive of a breast cancer would have been noted and, therefore, would have been diagnosed shortly thereafter or at least hopefully would have been diagnosed shortly thereafter." (Defendant's Exhibit 9, Videotaped Deposition of Mark Gittleman, M.D., January 17, 2008, p. 40).

In addition, Dr. David Harris, M.D. opined that had Ms. Glasow followed through with the prescribed ultrasound, the cancer would have been diagnosed in the Spring of 2004. (N.T. January 17, 2008, pp. 143, 144). Dr. Harris further testified that even if the cancer would have been found at that time, Ms. Glasow's prognosis was approximately a 20% chance of survival within a ten-year period. (N.T. January 17, 2008, p. 148). As of February 15, 2005, the date the cancer was diagnosed, her chances of survival were also in the 20% range. (N.T. January 17, 2008, pp. 148-149, 190).

Appendix B

STANDARD OF REVIEW

Judgment notwithstanding the verdict is the proper remedy in a civil case where the evidence is insufficient to sustain the verdict of the trial court. *Boutte v. Seitchik*, 719 A.2d 319 (Pa. Super. 1998). There are two bases upon which a judgment notwithstanding the verdict can be entered: (1) the movant is entitled to judgment as a matter of law, in which case a court concludes that even with all factual inferences decided adverse to the movant the law nonetheless requires a verdict in his or her favor; and (2) the evidence was such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant, in which case the court reviews the evidentiary record and concludes that the evidence was such that a verdict for the movant was beyond peradventure. *Rohm and Haas Co. v. Continental Cas. Co.*, 566 Pa. 464, 781 A.2d 1172 (2001). In evaluating a request for judgment notwithstanding the verdict, the facts must be considered in the light most favorable to the verdict winner. *Id.*

The decision to grant a new trial is one that lies within the discretion of the trial court. *Coker v. S.M. Flickinger Co., Inc.*, 533 Pa. 441, 625 A.2d 1181 (1993). A new trial should be granted only where the verdict is so contrary to the evidence as to shock one's sense of justice and not where the evidence is conflicting or where the trial judge would have reached a different conclusion on the same facts. *Davis v. Mullen*, 565 Pa. 386, 773 A.2d 764 (2001). The court should follow a two-step process in responding to a request for a new trial.

First, the trial court must determine whether a factual, legal or discretionary mistake was made during the trial. *Harman v. Borah*, 562 Pa., 455, 756 A.2d 1116 (2000). If it is determined that a mistake was made, the trial court must then evaluate whether the mistake provided sufficient basis for granting a new trial. The Supreme Court of Pennsylvania noted that:

> The harmless error doctrine underlies every decision to grant or deny a new trial. A new trial is not warranted merely because some irregularity occurred during the trial or another trial judge would have ruled differently; the moving party must demonstrate to the trial court that he or she has suffered prejudice from the mistake.

Id.

Additionally, a trial court's rulings as to evidentiary questions are controlled by the sound discretion of the trial court. Those rulings will not be disturbed unless a clear abuse of discretion is shown. *Sutherland v. Monongahela Valley Hosp.*, 2004 Pa. Super. 245, 856 A.2d 55, 59 (2004). An abuse of discretion is not merely an error of judgment, but if in reaching a conclusion, the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias or ill-will, as shown by the evidence or the record, discretion is abused. *Id.*

Appendix B

DISCUSSION

I. Defendants' Motion for Post-Trial Relief

A. Expert Opinion to the Requisite Reasonable Medical Certainty.

Defendants' first assert that judgment not withstanding the verdict should be entered in their favor, or in the alternative, a new trial should be granted, because Plaintiff's standard of care expert did not base his opinions to the requisite degree of reasonable medical certainty. Plaintiff, of course, claims that the expert did meet the requisite standard.

Dr. Alan Pinshaw testified on Plaintiff's behalf as an expert in obstetrics and gynecology and opined whether Defendant Dr. Skutches deviated from the medical standard of care by not referring Plaintiff for a biopsy. Dr. Pinshaw testified regarding his procedure in making a determination as follows:

> A. The first thing I do is I go through their records and get a very broad outline of what this case is about. . . I then flesh out the facts of the case so that I, from the medical records, extract everything that I think is pertinent to an opinion that I might reach on a factual basis.
>
> . . .

So I flesh out a factual scenario, then I wait for the depositions to come in. As you're probably aware at this point these are questions and answers which put a little more color and detail into what's represented in the medical record.

Very frequently, any opinions that I might have after looking at the records, the medical records, might become omitted or changed on occasion, or I understand better in the general sense what's going on when I've heard how people talk about it.

And then I try to reach a conclusion that speaks to a reasonable medical certainty, which means more likely than not, and so advise counsel.

Q. *Well, is it more likely than not, or is it to a reasonable medical certainty?*

A. *It's the same thing in my opinion.*

Q. With regard to the opinions you rendered in this case, can you tell me what opinions you rendered and why you rendered them?

> A. I had in the instance, one central opinion, and that is that on March 23, 2004, when Barbara Glasow complained of a lump in her breast and sought medical attention, as a consequence of that encounter, a biopsy — and I'll explain what that is in a moment — needed to be taken.

(N.T., January 16, 2008, pp. 101-103) (emphasis added).

Dr. Pinshaw further testified:

> This opinion is based on the fact that for many years now, certainly longer than I've been in practice, it has been known that examining a breast lump, although you may have an idea what you think it is and that it is malignant or nonmalignant, that's the bottom line.
>
> You can form an opinion if you wish, but you are mandated to check the opinion by testing the tissue.
>
> We all have our suspicions. "I don't think this is malignant" or "This looks malignant." You need to go to the tissue and have a look at it, and the diagnosis of fact, blunt, whether it's nonmalignant or malignant will be reported to you after you've submitted tissue to the pathologist.

(N.T., January 16, 2008, p. 105). The doctor also testified:

> Whether or not this patient at that time had cancer depends on a specific test. Let's call it "The Watermelon Test" just for ease of reference.
>
> You take a slice out, you look at it under the microscope; on that basis you will decide whether or not, and you have definitive evidence whether or not there is a malignancy.
>
> . . .
>
> On that day, that lesion needed to be, and the lesion's a "boo-boo" if you will. That abnormality needed to be biopsied.

(N.T., January 16, 2008, pp. 110-111). In addition, the following exchange took place between the witness and Plaintiff's counsel:

> Q. Doctor, you indicate in your report that the appropriate thing is to biopsy, is that fair to say?
>
> A. Yes, sir.
>
> Q. When the appropriate thing is to biopsy, should you tell that to a patient?
>
> A. Yes, sir.

Q. If you don't tell that to a patient that you need to get a biopsy, is that a violation of the standard of care?

A. It is.

(N.T., January 16, 2008, p. 113). Dr. Pinshaw finished his direct testimony by agreeing that he firmly held the opinions that he testified to. (N.T., January 16, 2008, p. 115).

In order to establish a *prima facie* case in a medical malpractice action, a plaintiff must present a qualified medical expert who will testify to a reasonable degree of medical certainty that the defendant health care provider deviated from the medical standard of care, and that such deviation was the proximate cause of harm. *Mitzelfelt v. Kamrin*, 584 A.2d 888 (1990); *Brannan v. Lankenau Hosp.*, 417 A.2d 196 (1980). "Experts are not required to use 'magic words' but rather this court must look to the substance of the expert's testimony to determine whether his opinions were based upon a reasonable degree of medical certainty rather than upon mere speculation." *Vicaris v. Spiegel*, 936 A.2d 503 (Pa. Super. 2007). Further,

> The trial court must look to the substance and the entirety of the testimony in order to determine whether it meets this standard. "That an expert may have used less definite language does not render his entire opinion speculative if at some time during his

> testimony he expressed his opinion with reasonable certainty." *Carrozza v. Greenbaum*, 866 A.2d 369, 379 (Pa. Super. 2004), *appeal denied*, 584 Pa. 698, 882 A.2d 1004 (2005).

Freed v. Geisinger Medical Center, 910 A.2d 68 (Pa. Super. 2006). In *Corrado v. Thomas Jefferson University Hospital*, 790 A.2d 1022 (Pa. Super. 2001), the Pennsylvania Superior Court upheld the trial court's entry of nonsuit after it found the plaintiff's doctor did not testify with sufficient certainty. The Court reasoned as follows:

> Corrado argues a non-suit on behalf of Dr. John Cohn was improper because he presented sufficient evidence to satisfy his burden of proof against Dr. Cohn through the expert testimony of Dr. DeJager. In response, Dr. Cohn argues that because of Dr. DeJager's failure to state his opinion with sufficient certainty, the grant of non-suit was correct. We agree. In *Eaddy v. Hamaty*, *supra*, our Court stated:
>
> We acknowledge that an expert need not testify with absolute certainty or rule out all possible causes of a condition. Nor do we require an expert to testify in precisely the language used to enunciate the legal standard. Rather, we review expert testimony in its entirety to assess whether it expresses the

requisite degree of medical certainty: "An expert fails this standard of certainty if he testifies 'that the alleged cause "possibly", or "could have" led to the result, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result.'"

Eaddy v. Hamaty, 694 A.2d 639, 642 (Pa. Super. 1997).

When asked whether he had an opinion based upon a reasonable degree of medical certainty if Dr. John Cohn deviated from the standard of care, Dr. DeJager answered, "more likely than not in my opinion he deviated from the standard of care." Dr. DeJager was then questioned about whether or not the decedent suffered any harm as a result of Dr. John Cohn's deviation from the standard of care, to which Dr. DeJager eventually responded, ". . . more likely than not [the decedent] would have responded to treatment in 1993 as she did a year later when they finally made the diagnosis of recurrent disease, that means that that patient would have been [sic] probably had a least 15 months symptom free status between 1993 and some time later." After reviewing his testimony in its entirety, we conclude that Dr. DeJager did not express the requisite degree of medical certainty. Corrado therefore failed to state a

> *prima facie* case of medical malpractice and the trial court's grant of non-suit was proper.

Id. at 1030-1031. (citations to the record omitted).

In *Carrozza v. Greenbaum*, 2004 Pa. Super. 464, 866 A.2d 369 (2004), defendant doctors, practices and hospitals appealed the denial of their post-trial motions for judgment n.o.v., or in the alternative a new trial, asserting that plaintiff did not present sufficient expert testimony on the alleged deviation from the standard of care or on causation. The radiologists in *Carroza* were found negligent for failing to recommend breast biopsies after reading plaintiff's mammogram films. The causation expert in the *Carrozza* trial testified as follows:

> Q. Do you have an opinion, within a reasonable degree of medical certainty, as to whether a biopsy performed in 1996 would have shown either cancer or a precancerous lesion?
>
> A. Yes.
>
> Q. And what is your opinion?
>
> A. I think my opinion is that more likely than not, if we had done a biopsy of the area of the calcifications in '96, we would have found either carcinoma in situ or a frank cancer at that time, a true cancer at that time.

Appendix B

******

So my opinion then as a surgical oncologist is to a reasonable degree of probability, [in 1996] there was carcinoma in situ. More likely than not, it was the same area of the breast where it was discovered [in 1999], and a biopsy later directed that [sic] the calcifications I think would have found carcinoma in situ.

Q. That is your opinion within a reasonable degree of medical certainty?

A. Yes.

******

Q. If a recommendation had been made for a biopsy and if a biopsy had been taken in 1998 or shortly after that mammogram was done in May of 1998, do you have an opinion, within a reasonable degree of medical certainty, as to whether that biopsy would have shown some, either a DCIS or a- the beginnings of an invasive cancer?

A. Yes.

Q. What is your opinion?

A. Again, I feel that either of those lesions would have been found at that time if they looked for it.

Id. at 381.

The *Carrozza* court examined the testimony in its entirety and found it sufficiently definitive to meet plaintiff's burden of proof as to both the standard of care and causation of harm. *Id.*

We have examined Dr. Pinshaw's testimony in its entirety, and find that he did not testify with the requisite degree of certainty to establish that Defendant deviated from the standard of care required in this matter. We find this case similar to *Corrado* in that the standard of care opinion was "more likely than not". Unlike *Carrozza*, *supra*, the opinions were never elicited to be to a reasonable degree of medical certainty.

Dr. Pinshaw unequivocally equated *his* reasonable degree of medical certainty with a "more likely than not" standard prior to offering any expert opinion. All opinions that followed, no matter how strongly worded, were based on an inappropriate degree of certainty. Dr. Pinshaw limited his testimony to "more likely than not" by giving his own meaning to the phrase "reasonable degree of medical certainty".

Although his opinions were "firmly" held, a complete reading of his testimony reveals that he firmly held his opinions to a more likely than not degree of certainty.

Such testimony is insufficient to meet the deviation of the standard of care requirement in a medical malpractice action. Plaintiff did not provide any additional standard of care experts, and therefore failed to state a *prima facie* case of medical malpractice.

B. Expert Opinion to the Proper Standard of Care.

Defendants' second claim is that he is entitled to a judgment notwithstanding the verdict or, in the alternative, a new trial, because Plaintiff's standard of care expert based his expert opinions on the standard of care applicable to a surgeon, not the applicable standard of care of an obstetrician-gynecologist. Plaintiff responds by first asserting that this issue was not appropriately objected to at trial and is therefore, waived. Alternatively, Plaintiff responds on the merits stating that her expert opined to the standard of care of an obstetrician-gynecologist, regardless of whether the obstetrician-gynecologist performs surgery or not, and if the obstetrician-gynecologist does not perform biopsies himself, then the obstetrician-gynecologist should tell the patient that she needs to get a biopsy performed by someone else.

Addressing the waiver issue first, Pa.R.C.P. 227.1, states in pertinent part:

> (b) except as otherwise provided by Pa.R.E. 103(a), post-trial relief may not be granted unless the grounds therefore,

(1) if then available, were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof or other appropriate method at trial; and

Note: If no objection is made, error which could have been corrected in pre-trial proceedings or during trial by timely objection may not constitute a ground for post-trial relief.

Pa.R.E. 103(a) provides that the specific ground for an overruled objection, or the substance of excluded evidence, need not be stated at or prior to trial, or without having made an offer of proof, if the ground of the objection, or the substance of the evidence sought to be introduced, was apparent from the context.

(2) are specified in the motion. The motion shall state how the grounds were asserted in pre-trial proceedings or at trial. Grounds not specified are deemed waived unless leave is granted upon cause shown to specify additional grounds.

Appendix B

The relevant testimony of Dr. Pinshaw included, in part:

Q. Could you explain what you base that opinion on, Doctor?

A. This is based on a very old and well-established surgical principle that a breast mass —

Mr. Laughlin: Objection.

The Court: Objection — that's non responsive, Doctor. Ask the question again, please. Wait. Is there another basis?

Mr. Laughlin: Yes. The nature of the principle. Mr. Margolis: I didn't hear that, Judge. I'm sorry.

The Court: Well, I think if the doctor starts his answer again we'll probably not have a problem. The question is, "Could you explain what you base that opinion on, Doctor?"

Appendix B

Witness: This opinion is based on the fact that for many years now, certainly longer than I've been in practice, it has been known that examining a breast lump, although you may have an idea what you think it is and that it is malignant or nonmalignant, that's the bottom line.

You can form an opinion if you wish, but you are mandated to check the opinion by testing the tissue.

(N.T., January 16, 2008, pp. 104–105).

It is asserted that Dr. Pinshaw did not connect his testimony to the standard of care applicable to an obstetrician-gynecologist nor did he testify that he was familiar with that standard of care. However, defense counsel did not object to the standard of care to which Dr. Pinshaw testified during Dr. Pinshaw's testimony or at the conclusion of it. Although one objection to the "nature of the principle" was made during the above colloquy, the doctor was permitted to rephrase his answer. If during Dr. Pinshaw's subsequent answer defense counsel believed the testimony was not being provided to the applicable standard of care of an obstetrician-gynecologist, a subsequent objection was required.

Appendix B

The failure to object to Dr. Pinshaw's testimony as it related to the standard of care applicable to an obstetrician-gynecologist precluded Plaintiff from having an opportunity to address the asserted problem during trial. Such an objection is required to preserve an issue for post-trial relief for such a reason. Because no objection was made, the issue was waived and cannot now be addressed post-trial. Accordingly, Defendants' second issue is denied as waived.

II. Plaintiff's Cross-Motion for Judgment Notwithstanding the Verdict and Cross Motion for Post-Trial Relief Pursuant to Rule 227.1(c).

A. Contributory Negligence.

Plaintiff asserts that she is entitled to judgment notwithstanding the verdict in the amount of $3,973,000, representing the full amount of the verdict, because Defendants did not offer expert testimony evidence that Plaintiff was contributorily negligent, nor did they provide a logical, reasonable, or practical basis for apportionment of negligence. Defendants respond that there was ample evidence at trial that Plaintiff's conduct in failing to obtain the prescribed ultrasound contributed to her increased risk of harm by delaying her diagnosis of cancer.

The plaintiff claims that Dr. Skutches' negligence delayed the diagnosis, and thereby delayed life-saving treatment, which increased the plaintiff's risk of harm.

Plaintiff's expert testified that, had diagnosis and treatment been prompt, the plaintiff's statistical chances for surviving the cancer would have been higher, thereby establishing an "increased risk of harm" case. (Plaintiff's Exhibit 7 D, Video Deposition of Gerald H. Sokol, M.D., January 12, 2008, pp. 02334-02336). The defendants' expert testified that there was no increased risk of harm, because the survival rate was the same whether the cancer was diagnosed in the Spring of 2004 or 11 months later on February 15, 2005. (N.T. January 17, 2008, p. 148-149, 190).

However, if the jury believed that the delayed diagnosis increased the risk of harm to the plaintiff, they were also free to consider the relative responsibility that the parties bore for the delay. Defendants presented expert testimony that an ultrasound would have called into question the misdiagnosis of Dr. Skutches. Therefore, by failing to obtain an ultrasound, plaintiff herself contributed to the delay in a correct diagnosis, and thereby increased her own risk of harm. The jury may consider that, if it accepts plaintiff's contention that delay did increase her risk of harm, it may also consider that she herself contributed to the delay.

Defendants did not provide expert testimony establishing the degree to which Plaintiffs failure to obtain the prescribed ultrasound increased her harm. Plaintiff cites the cases of *Martin v. Owens-Corning*, 515 Pa. 377, 528 A2d 947 (1987), and *Lee v. Pittsburgh Corning Corp.*, 420 Pa. Super. 423, 616 A.2d 1045 (1992), where defendants failed to present expert testimony on

the causation of lung cancer, for the proposition that the issue of comparative negligence should not have been submitted to the jury.

The cases relied on by the Plaintiff for the proposition that an expert witness is required in order to apportion causation are product liability cases. The instant case is not a product liability case, but an "increased risk of harm" case, pursuant to *Hamill v. Bashline*, 481 Pa. 256, 392 A.2d 1280, 1285 (1978). We did not find any authority that an increased risk of harm case requires the defendant to produce expert testimony to allow the jury to apportion negligence pursuant to the Comparative Negligence Act. In fact, the reduced threshold of proof necessary to be submitted to the jury envisions a more relaxed approach with regard to apportionment of responsibility. "Once the jury is apprised of the likelihood that defendant's conduct resulted in plaintiff's harm, that Section [323(a) of the Restatement (Second) of Torts] leaves to the jury, and not the medical expert, the task of balancing probabilities. . ." *Carrozza*, supra, citing *Hamil v. Bashline.*

The defendant is free to offer inconsistent defenses, which he did in this case. He claimed that the delay in diagnosis created no meaningful difference in the plaintiff's prognosis, but, if it did, the plaintiff herself must share the blame.

Therefore, the question for the jury to resolve is: did the plaintiff herself also contribute to the delay in

diagnosis, by failing to see Dr. Schadt when the lump continued to be painful, or for failing to get the prescribed ultrasound which would have revealed the need for a biopsy?

The plaintiff in a negligence action is contributorily negligent if his conduct falls below the standard of care to which he should conform for his own protection, and if his conduct is a contributing cause, with the defendant's negligence, in bringing about his harm. *Thompson v. Goldman*, 114 A.2d 160, 162 (Pa. 1955); *Columbia Med Group, Inc. v. Herring & Roll, P.C.*, 829 A.2d 1184, 1192 (Pa. Super. 2003). When there is any evidence of contributory negligence in a case, the jury must consider the issue, regardless of how slight the evidence is or how strong any contrary evidence may be. *Angelo v. Diamontoni*, 871 A.2d 1276, 1280 (Pa. Super. 2005), *appeal denied*, 889 A.2d 87 (Pa. 2005). Because it was up to the jury to determine the factual responsibility for the delay, not only would an expert have been meaningless on this issue, but irrelevant. An expert could not have resolved the factual issue of whether the plaintiff failed to take the steps necessary to protect her own health.

Appendix B

B. Jury Instructions Requesting "Intentional Alteration or Destruction of Medical Records" and Striking the "Error of Judgment" Instruction.

Plaintiff has objected to a new trial, but has requested certain measures regarding jury instructions in the event a new trial is granted. Plaintiff is not seeking a new trial and in fact objects to such relief. We find the request regarding specific jury instructions in the absence of the relief requested nothing more than a request for an advisory opinion, which we decline to compose.

BY THE COURT:

s/ Carol K. McGinley, J.
CAROL K. McGINLEY, J.

Dated: June 3, 2008

APPENDIX C — ORDER OF THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED MAY 26, 2010

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 669 MAL 2009

Petition for Allowance of Appeal from the
Order of the Superior Court

BARBARA L. GLASOW,

Respondent

v.

JOSEPH M. SKUTCHES, M.D., AND ST. LUKE'S HOSPITAL PHYSICIAN GROUP,

Petitioners

ORDER

PER CURIAM

AND NOW, this 26th day of May, 2010, the Petition for Allowance of Appeal is hereby **DENIED.**

Madame Justice Orie Melvin did not participate in the consideration or decision of this matter.

No. 10-282

Supreme Court, U.S.
FILED
SEP 21 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

JOSEPH M. SKUTCHES, M.D. and
ST. LUKE'S PHYSICIAN GROUP,

Petitioners,

v.

BARBARA L. GLASOW,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of Pennsylvania, Philadelphia Office

RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether Petitioners' Petition for a Writ of Certiorari should be denied because Petitioners have failed to produce any evidence before any Court to factually support their allegations of bias against Judge Jack A. Panella of the Pennsylvania Superior Court and because Petitioners have presented no compelling reason for granting their Petition as the issues raised involve the application of well-settled principles of law to the facts of this matter as opposed to an important undecided issue.

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COUNTER STATEMENT OF THE CASE

On March 23, 2004, Respondent's Decedent, Barbara Glasow,[1] was a gynecological patient of Petitioner, Dr. Skutches, and on that date she had an office visit with a chief complaint of a lump in her right breast which was painful. Respondent's Decedent, Ms. Glasow, specifically went to Petitioner, Dr. Skutches to determine whether the lump was cancerous. After an examination, Petitioner, Skutches diagnosed the lump as a sebaceous cyst of the chest wall. Petitioner, Skutches informed Respondent's Decedent that the lump was not cancer and that there was no cause for alarm. He did not order a biopsy of the lump, nor any other additional diagnostic testing. He further advised Respondent's Decedent, Ms. Glasow, that it would eventually open up and drain on its own, but if it became more painful, she could have it drained by Dr. Mark Schadt, a surgeon who had previously followed Respondent's Decedent for cysts. As Respondent's Decedent was advised the cyst was not cancer, and no action was

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[1] On May 5, 2010, Respondent's Decedent filed a notice of Death and a Stipulated Petition to Change Caption (which was agreed to by Paul Laughlin, Esq. who was trial counsel and co-counsel in state court with Petitioner's moving counsel herein) which was thereafter entered by the trial court. Thus, the proper caption to this matter should read "Patricia J. Sayler, Executrix of the Estate of Barbara Lorraine Glasow, a/k/a Barbara L. Glasow, Deceased vs. Joseph M. Skutches, M.D., and St. Luke's Hospital and Health Network, d/b/a St. Luke's Obstetric and Gynecology Associates".

necessary unless the cyst became painful, she took no further action at that time. During the latter half of 2004 the supposed cyst began to grow and in early January, 2005, it broke open in two areas and began to bleed. On or about February 15, 2005, Respondent's Decedent sought treatment from Dr. Mark Schadt; he performed a biopsy of the supposed cyst on that date. The biopsy revealed a poorly differentiated adenocarcinoma representing breast cancer and that the supposed cyst had actually been a malignant tumor.

On Monday, January 14, 2008, a jury trial was commenced beginning with jury selection. During the trial, Respondent's Decedent's medical expert testified that the relevant standard of care for treatment of a lump in the breast required that Petitioner either perform a biopsy, or refer the patient to someone to perform said biopsy. The trial ended on Friday, January 18, 2008 with a verdict in favor of Respondent's Decedent. The jury found Petitioners sixty-five percent (65%) negligent and found Respondent's Decedent thirty-five percent (35%) comparatively negligent. Following the Verdict, Motions for Post-Trial Relief were filed by Petitioners and Cross-Motions were filed by Respondent's Decedent.

On May 27, 2008, the trial judge entered an Order granting Defendants' (Petitioners, herein) Motion for Post-Trial Relief in the nature of a judgment notwithstanding the verdict in favor of Defendants and against Plaintiff (Respondent, herein) on the basis that Plaintiff's standard of care expert failed to

testify to the requisite reasonable degree of medical certainty, reversing her initial holding at the time of trial.

On June 2, 2008, Respondent's Decedent filed a Notice of Appeal to the Superior Court, alleging error on the part of the trial judge as Respondent's Decedent's expert did testify to the requisite degree of medical certainty.

Having received none of the One Hundred Sixty-Five Thousand Seven Hundred and Fifty ($165,750.00) Dollars which would have been due by that time pursuant to the jury's verdict for 'future' medical treatment and not having been able to obtain the necessary treatment to slow or cure her cancer, Respondent's Decedent succumbed to the cancer and died on May 23, 2009.

On June 4, 2009, the Superior Court entered an Opinion and Order finding that Respondent's Decedent's expert did testify to the appropriate standard of care under Pennsylvania law and reversing the Trial Court, with instructions to enter judgment in favor of Respondent's Decedent for the damages determined by the jury, reduced by the amount of contributory negligence allocated to Respondent's Decedent.

On June 18, 2009 Petitioners filed an application for reargument *en banc*. In their application for reargument, they raised the substantive legal issue which had been decided by the appellate panel, alleging that Plaintiff's standard of care expert failed

to testify to the requisite reasonable degree of medical certainty; in addition, they also raised, for the first time, the issue of Judge Panella's alleged bias. No affidavit was supplied by any affiant suggesting bias on the part of Judge Panella, instead, Petitioners merely attached a transcript of Judge Panella's installation ceremony, dated January 4, 2004, a newspaper article from the *Allentown Morning Call* newspaper, regarding the January 4, 2004 installation, a newspaper article from the *Allentown Morning Call* newspaper, dated April 29, 2004 regarding a Penn State University charity event and the Pennsylvania Department of State, Campaign Finance Reports, regarding the 2003 Superior Court Election. On August 11, 2009, the Pennsylvania Superior Court, *en banc*, denied the application for re-argument, both with regard to the substantive legal issue which had been decided by the panel below and also with regard to the alleged bias on the part of Judge Panella.

On September 8, 2009, Petitioners herein filed a Petition for *allocatur* to the Pennsylvania Supreme Court. Again, they raised both the substantive legal issues which were decided by the panel of the Superior Court and for which they were denied a rehearing *en banc*, as well as the allegations of bias against Judge Panella. Again, they failed to file any affidavits regarding this alleged bias, but merely attached the above-mentioned material. On May 26, 2010, the Pennsylvania Supreme Court denied *allocatur* on

both the substantive legal issues and on the claim of bias.

REASONS FOR DENYING THE PETITION

THERE WAS NO REASON FOR JUDGE PANELLA TO RECUSE HIMSELF OR DISCLOSE HIS PROFESSIONAL AND COLLEGIAL RELATIONSHIP WITH A NAMED PARTNER IN RESPONDENT'S FIRM.

A. PETITIONERS FAILED TO PRODUCE ANY EVIDENCE BEFORE THE STATE COURTS OR BEFORE THIS COURT TO FACTUALLY SUPPORT ANY OF THEIR ALLEGATIONS OF BIAS AGAINST JUDGE PANELLA.

Prior to addressing the allegations of bias, it should be noted that despite request for review of the substantive Pennsylvania legal questions regarding whether the Respondent's expert testified to the requisite standard of care, both the Pennsylvania Superior Court *en banc*, and the Pennsylvania Supreme Court failed to find any error worthy of review. Thus, this application for Writ of Certiorari is no more than a delay tactic to prevent Respondent's decedent from collecting on the verdict entered by the jury, as the substantive state law question is well decided.

Under Pennsylvania law, the standards requiring recusal of a judge are well established. "It is the burden of the party requesting recusal to produce

evidence establishing bias, prejudice or unfairness which raises a substantial doubt as to the jurist's ability to preside impartially." *Com. v. Abu-Jamal*, 553 Pa. 485, 507, 720 A.2d 79, 89 (Pa. 1998); *see also*, *Com. v. Tedford*, 598 Pa. 639, 731, 960 A.2d 1, 55-56 (Pa. 2008). Further, "[i]f a party questions the impartiality of a judge, the proper recourse is a motion for recusal, requesting that the judge make an independent, self-analysis of the ability to be impartial." *Com. v. Druce*, 577 Pa. 581, 588-589, 848 A.2d 104, 109 (Pa. 2004). To support such motion for recusal, Petitioners "must produce some **evidence** of the necessity for that disqualification." (Emphasis added) *Com. v. Perry*, 468 Pa. 515, 526, 364 A.2d 312, 318 (Pa. 1976). The evidential requirement is consistent with 28 U.S.C. § 144, which provides in pertinent part:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

That has simply never been done in this matter. No affiant has ever sworn that Judge Panella had a personal bias either against Petitioners or in favor of Respondent.

Equally significant is the fact that Petitioners raised this claim for the first time after they received

an adverse ruling from the Appellate panel. Under Pennsylvania law, "[n]o party has any burden – either a burden of exercising 'due diligence' or otherwise – to search out and discover whether perhaps there may exist some fact, known to the judge but unknown to the party, that requires recusal." *Reilly by Reilly v. Southeastern Pennsylvania Transp. Authority*, 330 Pa. Super. 420, 479 A.2d 973, 988 (Pa.Super. 1984). Nonetheless, Petitioners cannot wait until they have received an adverse ruling and then use their prior knowledge of any relationship as a sword to obtain a second opportunity to argue their position. This is consistent with Federal law. "A party may not elect to take a chance on gaining a favorable decision and then, if the decision is unfavorable, raise grounds for recusal of which he or his counsel had actual knowledge prior to the decision being made. *See Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.), cert. denied, 459 U.S. 839, 103 S.Ct. 86, 74 L.Ed.2d 81 (1982)" (cites included) *Id.*, at Pa. Super. 450-451, A.2d 988-989.

In the case at bar, Petitioners' trial counsel and appellate counsel below, Paul Laughlin, is also a local Northampton/Lehigh County attorney, familiar with both Martin Cohen[2] and Judge Panella. He was

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[2] Attorney Paul Laughlin, Petitioners' trial and Appellate counsel, is a Northampton/Lehigh County attorney; he also knows Martin D. Cohen for many years; in fact, attorney Laughlin received campaign contributions from attorney Martin D. Cohen in the amount of $250.00 during attorney Paul Laughlin's failed

(Continued on following page)

present at oral argument before the panel which included Judge Panella, yet he failed to raise any issues regarding recusal at that time. Instead, Petitioners waited until after the Superior Court reversed the trial judge and directed an entry of judgment upon the jury's verdict to raise this issue. As has been noted in the Pennsylvania courts, "timeliness is significant because [the courts] cannot tolerate [a] litigant knowing information and holding back hoping for favorable rulings and then seeking recusal when rulings are not favorable."[3] *Id.*, at Pa. Super. 450-451, A.2d 988-989, citing *Smith v. Danyo*, 585 F.2d 83 (3d Cir. 1978).

Even had the past collegial relationship between Judge Panella and attorney Cohen not been known by Petitioners' counsel, there was no basis which would require Judge Panella to disclose a past relationship with attorney Cohen, as that is not the type which would give rise to the appearance of impropriety. "Judges are not required to recuse under [28 USC] § 144 when facts stated in a supporting affidavit show that they have a casual, professional relationship

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election campaign to obtain a seat on the bench in the Lehigh County Court of Common Pleas. (See Appendix p. 1)

[3] Petitioners' Appellate counsel, John Hare has alleged in their Petition at page 14, footnote 4, that he did not learn of the alleged 'relationship' between Judge Panella and attorney Cohen until after the June 4, 2009 decision by the Superior Court panel; nonetheless, this has never been sworn to in any Petition of Affidavit and it ignores any knowledge held by trial and appellate counsel, Paul Laughlin.

with an attorney, victim, witness, or litigant appearing before them in court. Recusal is required only when the stated facts establish a personal relationship of such magnitude that the judge cannot be impartial." *U.S. v. Olis*, 571 F.Supp.2d 777, 786 (S.D.Tex. 2008).

Instead of presenting any reviewing court with facts via an appropriately sworn affidavit, Petitioners rely on two assertions, the former is acknowledged, the latter is unsupported supposition. The first contention is in regard to money contributed by members of the Cohen & Feeley law firm to Judge Panella's 2003 election campaign and second is the unsupportable allegation of close personal friendship between Judge Panella and Martin Cohen, the first named partner in the firm, who had no involvement in the handling of the underlying medical malpractice action.

Petitioners cite the recent United States Supreme Court decision in *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252, 2009 WL 1576573, 77 USLW 4456 (2009) for the undisputed proposition that "a fair tribunal is a basic requirement of due process." *Id.*, at 6. Petitioners, in their arguments before the Pennsylvania Superior Court and Supreme Court

generally cited Canon 3C(1) of the Code of Judicial Conduct,[4] adopted by the Pennsylvania Supreme Court, effective January 1, 1974, yet they failed, as they do here, to point to any specific acts of impropriety allegedly committed by Judge Panella. Further, there is nothing in the anecdotal, unsworn information supplied by Petitioners that gives rise to any appearance of impropriety such that the judge would be required to disclose and/or recuse himself.

It appears from the submissions of Petitioners that attorney Cohen gave $2,500.00 in campaign contributions to Judge Panella's campaign in 2003 and that Dennis Feeley, another named partner in the firm, gave $2,000.00. (See Appendix pp. 2-3) For complete accuracy, having checked campaign contribution records, trial and underlying appellate counsel for Plaintiff/Respondent's Decedent, Steven J. Margolis, also a partner in the firm, contributed $200.00 to Judge Panella's campaign in 2003. (See Appendix p. 4) It appears to be the contention of Petitioners that these campaign contributions either by themselves,

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[4] Canon 3(C)(1)(a) of the Code of Judicial Conduct provides:

C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

or in conjunction with the unsupported allegations of a close personal relationship between Martin Cohen and Judge Panella required Judge Panella's disclosure of that information and further, his recusal in this matter.

The plurality of the United States Supreme Court, in *Caperton*, *supra*, specifically noted that "**[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal,** but **this is an exceptional case**."[5] (Emphasis added) *Id.*, at 11. Unlike the facts in *Caperton*, *supra*, the total of all contributions of all members of the Cohen & Feeley law firm still amounts to less than one percent of the total amount of $584,195.00 raised by Judge Panella for that 2003 election cycle. (See Appendix pp. 5-6). Additionally, in the *Caperton* case, this court noted:

> **The temporal relationship between the campaign contributions,** the justice's election, **and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were**

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[5] In the *Caperton* case, as this Court is well aware, Respondent's Decedent "**contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee**. App. 288a. Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined." (Emphasis added) *Caperton*, *supra*, at 11.

> **made, that the pending case would be before the newly elected justice.** (Emphasis added) *Id.*, at 12.

In the present matter, it can hardly be contended that in making campaign contributions to Judge Panella in 2003, it was expected that Judge Panella, in 2009, would be sitting on the appeal *sub judice* being handled by one of attorney Cohen's partners, when the underlying medical malpractice of the Petitioner doctor and medical practice did not even occur until 2005, two years after the foregoing campaign contributions were made.

The second issue raised by Petitioners as the basis for recusal is the allegation that Martin Cohen and Judge Panella have a close personal friendship which would require recusal. In assessing whether or not there was a close personal friendship, Petitioners rely upon two newspaper articles and the transcript of Judge Panella's Superior Court installation ceremony performed in the Northampton County Courthouse. They supply no factual affidavits and even misstate and take out of context the comments made by Judge Panella during that ceremony to imply a closer relationship than actually exists or existed. Petitioners claim that Judge Panella called Martin Cohen one of his "good buddies". In fact, at his installation, Judge Panella stated:

> As I said, there are too many people to thank from the campaign. I must make specific mention though of Attorney Steven Goudsouzian, who sacrificed many long hours. Without the

> guidance and support of people like District Attorney John Morganelli, Martin Cohen, my good buddies, Phil Hof and Steve Molder, Joe Long, and John Werkheiser, and there are so many others – I apologize if I missed you from the bottom of my heart an endless thank you. (See Appendix p. 46).

When he talked about "good buddies", Judge Panella was clearly referring to Phil Hof and Steve Molder. In fact, it was attorney Phil Hof who gave the introductory speech for Judge Panella that day. (See Appendix pp. 12-21).

When assessing any alleged "relationship" between Judge Panella and attorney Cohen or any campaign contribution which was made seven (7) years ago by members of the Respondent's Decedent's law firm, courts must review facts, not speculation and surmise. Mere conclusions, opinions, rumors or vague gossip are insufficient. *Berger v. U.S.*, 255 U.S. 22, 34, 41 S.Ct. 230, 233 (1921) Justice Scalia, in denying a request for his recusal, noted that "[t]he decision whether a judge's impartiality can 'reasonably be questioned' is to be made in light of the facts as they existed, and not as they were surmised or reported." *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 541 U.S. 913, 914, 124 S.Ct. 1391, 1392 (2004) Further, Justice Rehnquist stated "[t]his inquiry is an objective one, made from the perspective of a reasonable observer who is informed of all the surrounding facts and circumstances." *See Microsoft Corp. v. United States*, 530 U.S. 1301, 1302, 121 S.Ct. 25, 26,

147 L.Ed.2d 1048 (2000). Petitioners herein support their Petition for a Writ of Certiorari with mere supposition based upon two newspaper articles and an out of context quote from Judge Panella's installation speech. Petitioners have failed to supply this court with any facts on which it could grant their requested writ. They have presented no evidence indicating that Judge Panella's relationship with Martin Cohen has ever been anything more than collegial. As this court has held "a federal judge has a duty to sit where not disqualified which is equally as strong as the duty to not sit where disqualified." *Laird v. Tatum*, 409 U.S. 824, 838, 93 S.Ct. 7, 15 (1972). Thus, Judge Panella fulfilled his judicial obligation.

B. PETITIONERS HAVE PRESENTED NO COMPELLING REASON FOR GRANTING THEIR PETITION FOR A WRIT OF CERTIORARI AND THEREFORE SAID PETITION SHOULD BE DENIED.

Rule 10 of the Rules of the United States Supreme Court provides the character of the compelling reasons for granting a petition for a writ of certiorari. While the reasons enumerated in the Rule are not controlling or a complete measure of the Court's discretion, their listing provides guidance regarding the circumstances which must be present to create a compelling reason supporting the granting of a petition. As this Court is well aware of Rule 10, the Rule

will be addressed without recitation of the text herein.

The subject of this Petition is not an issue that has been the subject of conflicting appellate decisions as to call for this Court's supervisory power. Instead, Petitioners raise a question which amounts to the alleged misapplication of a properly stated rule of law, bias and judicial recusal. This Court previously stated in dismissing a writ which was improvidently granted "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393, 43 S.Ct. 422, 423 (1923); *see also, Magenau v. Aetna Freight Lines, Inc.*, 360 U.S. 273, 285, 79 S.Ct. 1184, 1191 (1959).

Petitioners herein attempt to couch their petition so that it appears to raise a question not yet addressed by this court. In fact, as stated above, the denial of *allocatur* of the Pennsylvania Supreme Court is consistent with this Court's holding in *Caperton*, *supra*, as well as the well-established principle that Judges are permitted to have friends who are attorneys. Recusal based on friendship is clearly not a compelling reason to grant a petition for a writ of certiorari as it has been established that "every federal court faced with arguments for recusal

based on friendship have found recusal unnecessary." *M.K. Metals, Inc. v. National Steel Corp.*, 593 F.Supp. 991, 995 (D.C.Ill. 1984). Such a well-established principle of law is not an appropriate basis for grating this petition.

In this matter the Pennsylvania Supreme Court has not decided any important federal question in a way that conflicts with a decision on the same issue of any other state court of last resort or a United States court of appeals. Nor has the state court in this matter decided an important question of federal law that has not been settled by this Court. Therefore, no compelling reason exists to support granting the petition before this Court.

CONCLUSION

Petitioners have not met their burden in raising any compelling reason for the granting of this Petition for a Writ of Certiorari. Petitioners have failed to produce any evidence before the state courts or before this Court to factually support their allegations of bias. Petitioners' claim that campaign contributions in 2003 of less than one percent of the total amount raised by Judge Panella for that 2003 election cycle raise an equivalent concern to that raised in *Caperton*, *supra*, is baseless and is not a compelling reason to grant a petition for a writ of certiorari. Further, none of Petitioners' claims regarding the supposed close personal friendship between Judge

Panella and Martin Cohen, a partner in Respondent's Decedent's counsel's firm who had no involvement in the handling of the case, even assuming *arguendo* that they were factual and not merely based on supposition, create a legitimate question regarding the existence of a close personal relationship between Martin Cohen and Judge Panella which required Judge Panella's disclosure of that information and his recusal in this matter. Finally, there is no issue that conflicts with or presents an undecided important federal question. This Court addressed campaign contributions in *Caperton, supra*, and questions of collegiality among jurists and practicing attorneys have been extensively and consistently addressed as stated above. As Petitioners have failed to meet their burden, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

COHEN & FEELEY

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Contribution Details

Contributor	Date	Amount
Martin D. Cohen Easton, PA 180434449	2/13/2003	$250.00

Occupation: –

Employer: PA

Description: Monetary Contribution –

Recipient: Citizens for Paul Laughlin

Report: 2003 Cycle 2

Contribution Details

Contributor	Date	Amount
MARTIN D. COHEN EASTON, PA 180434449	5/14/2003	$2,500.00

Occupation: ATTORNEY

Employer: –

Description: Monetary Contribution –

Recipient: PANELLA, JACK
JUDGE FOR SUPERIOR CT

Report: 2003 Cycle 3

Contribution Details

Contributor	Date	Amount
DENNIS FEELEY BETHLEHEM, PA 18015	5/7/2003	$2,000.00

Occupation: ATTORNEY

Employer: –

Description: Monetary Contribution –

Recipient: PANELLA, JACK
JUDGE FOR SUPERIOR CT

Report: 2003 Cycle 3

Contribution Details

Contributor	Date	Amount
STEVEN J. MARGOLIS BETHLEHEM TOWNSHIP, PA 18045	4/25/2003	$200.00

Occupation: –

Employer: –

Description: Monetary Contribution –

Recipient: PANELLA, JACK
JUDGE FOR SUPERIOR CT

Report: 2003 Cycle 7

Campaign Finance Report
Report Cover Page

Filer Identification Number			**Report Filed By**	
2003141			Committee	
Name and Address of Filing Committee Candidate or Lobbyist				
PANELLA, JACK JUDGE FOR SUPERIOR CT 2925 WILLIAM PENN HIGHWAY, SUITE 301 EASTON, PA 180455283				
Report Cycle	**Type of Report**	**Election Date**	**Amendment**	**Termination**
2003 Cycle 7	Annual		No	Yes
Office Sought by Candidate		**District**	**Party**	**County**
Judge of the Superior Court		0	Democratic	Northampton

Summary of Receipts and Expenditures Through:	
A. Amount Brought Forward from Last Report	$0.00
B. Total Monatary Contributions and Receipts (from Schedule I)	$584,195.00
C. Total Funds Available (Sum of Lines A and B)	$584,195.00
D. Total Expenditures (from Schedule III)	$584,195.00
E. Ending Cash Balance (Subtract Line D from Line C)	$0.00

F. Value of In-Kind Contributions Received (from Schedule II)	$5,398.24
G. Unpaid Debts and Obligations (From Schedule IV)	$0.00

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890 A.2d – 892 A.2d

Superior Court of Pennsylvania

Installation Ceremony

HONORABLE
JACK A. PANELLA

January 9, 2004

Proceedings

MR. MORRISSEY: Let the ceremonial session of the Superior Court of Pennsylvania, President Judge Del Sole presiding, come to order. Let all manner of persons arise in attendance, let the family, friends, associates of the Honorable Jack A. Panella be joyful, to the citizens of this Commonwealth, confident and assured, as the Superior Court convenes for administration to the Honorable Jack A. Panella of the Oath of Office of the Superior Court of Pennsylvania. God save the Commonwealth and this Honorable Court.

PRESIDENT JUDGE DEL SOLE: Be seated everyone.

Good afternoon. What a great day, important for the Panella family and for our new member, Judge Jack Panella. It is a joyful occasion. And obviously, Jack, you either have a lot of friends or a lot of people looking for a position on the Court of Common Pleas, I'm not sure which it is, but we'll find out as the day goes on.

At this time I would like to call Brigadier General Jessica L. Wright forward, please.

General Wright, Color Guard, advance the colors.

Ladies and gentlemen, would you please rise, Honorable Judges, Bishop Cullen and ladies and gentlemen, would you please join me in reciting the Pledge of Allegiance.

(The Pledge of Allegiance was recited, led by Brigadier General Wright.)

PRESIDENT JUDGE DEL SOLE: At this time I would like to call upon the Most Reverend Edward P. Cullen, Bishop of the Diocese of Allentown.

BISHOP CULLEN: Let us pray. Lord, help Your servant, Jack, to fully appreciate that he cannot bring justice to his new office unless he dwells with You and that he cannot dwell with You and reflect the wisdom of Your caring love unless he accepts Your call to be a living sign of selfless service. Lord, teach him to be humble and charitable in spirit. Take from him all false confidence in his own strength and never allow him to place his only hope in forms of earthly power. Fill him with a thirst for justice and a

zeal for compassion. Dispose his heart to respect the rights of all citizens. Help him to promote harmony and fairness for every individual as well as the common good of our society. Let him rejoice, especially in serving those who have nothing to offer except their needs and their dignity as human beings.

Foremost, let him never forget the impoverished, exploited and oppressed. Let tumidity and fear have no influence in his deliberations rather may the character of his work be marked by those virtues that will foster justice in all circumstances.

Give him the gift of prudential judgment so that his decisions are always rooted in spiritually sound moral values, especially those which hold in highest priority the well being of all human life.

Aware of Your abiding presence we ask that You grant Your servant, Jack, the blessings of insight, friendship and encouragement. Let him come into his new life through his colleagues and associates, who will assist him carrying out the responsibility of his new office.

Conscious that the future is unknown, yet encouraged by Your unconditional love, we here prayerfully seek new spirituality, strength, for every elected official throughout our Commonwealth.

It is with faith that we place this prayer before You, the Lord, and Father of us all. Amen.

PRESIDENT JUDGE DEL SOLE: Please remain standing while Matthew James Allshouse renders the National Anthem.

(Matthew Allshouse sang the National Anthem.)

PRESIDENT JUDGE DEL SOLE: Ladies and gentlemen, please be seated.

The Superior Court of Pennsylvania for over 107 years has been convening in ceremonial sessions on and off for the happy and joyful purposes of installing new members of the Court. And we are here today to present ceremonially the Oath of Office to Jack Panella, one of our newest members.

There was some question whether this election would ever end. I'm sure most of you were following it, as were the members of this Court. I can assure you; however, that, with the understanding of the Supreme Court of Pennsylvania we were committed to making sure that at least Judge Panella and Judge McCaffrey were working as of last Monday, although they might not have been earning the salary of the Superior Court Judge.

Judge Panella, you join a Court that has been in service since 1895 in Pennsylvania. It is one of the busiest intermediate Appellate Courts in the United States. Last year we had over eight thousand four hundred appeals filed in this Court. And the Judges in this Court filed decisions in over five thousand cases. Considering that we only have fifteen commissioned Judges and eight Senior Judges that is a

remarkable workload per Judge. And no Court in this Country decided that many cases per Judge, no intermediate Appellate Court. So we are quite proud of the work that we do and we know that we are receiving a new member who has also distinguished himself through hard work and dedication to the Rule of Law.

He began practicing law in 1980. Judge Panella served as a Law Clerk, you were a County Solicitor, and you have been a Judge on the Court of Common Pleas here in your beloved Northampton County. You have also been the President Judge of the Court of Judicial Discipline. We know that no one achieves those goals, no one achieves those positions unless they are committed to working hard, to dedication to their and job and to their community. And we welcome you to the Court. You are going to find it a wonderful institution and colleagues who will be most helpful to you as you begin your duties.

I would like to take a moment and first thank the Judges of the Northampton County Court of Common Pleas for allowing us to use this beautiful Courtroom, particularly the President Judge, who we've been on many different groups together. Bob, we thank you for allowing us to be here today and help celebrate in the homecoming of our new Judge on this wonderful event.

With that I'm going to call upon Philip Hof, Esquire, for remarks.

Mr. Hof.

PHILIP HOF, ESQUIRE: Your Honor, good afternoon everyone. Members of the Clergy, Judiciary Administration, elected officials, friends, family and my fellow members of the Bar. We wouldn't be here today it not for Jack Anthony Panella. But His Honor asked that this not be a testimonial to him in the nature of a eulogy. And really it would be inappropriate to eulogize an Appellate Judge until he's authored his first opinion. In light of that, I think a judicial argument might be more appropriate, however brief I can try to make it.

And therefore, may it please the Court; and the Court; and the Court; this question presented on appeal must look to the Pennsylvania Rules of Judicial Administration. Rule 703 provides that it is the policy of the unified judicial system that any matter, at any stage of a proceeding be brought to a fair conclusion as promptly as possible consistent with the character of the matter and the resources of the system. And the requirements of this Rule further specify and implement this policy in keeping with the Court's constitutionally mandated policy and responsibility to oversee property, proper disposition of the business of the Pennsylvania Court. So the question presented on appeal is whether a Common Pleas Judge from Northampton County, and the Borough of Brooklyn, elected by overwhelming votes to the Superior Court of Pennsylvania is likely to implement prompt and fair administration and disposition of appeals. The suggested answer so far is yes. And for precedent we cite three sources, the Northampton

County Court of Common Pleas, our cherished Bench, this Bar and the supporting family of this Appellate Judge.

Source Number 1 is the Bench. And this allows you to know whether I'm one third through, two-thirds through, et cetera. The Third Judicial District, Northampton County, is a source of pride to this Bar and this community. I am always moved like they are talking about my own child when I go to another venue and this is the point where the Judge or opposing counsel says, "oh, Easton is that Northampton County?". And I say, yes. And they say, good Bench, quality Bench. Those couple of words mean an awful lot because this Bench is known, although we are on top of a hill, we're not on a hill because it is known for a level playing field for any litigant who comes before this Court for adjudication. Lead by a President Judge whose conduct defines the standard of what that position should be. And thanks to Judge Panella's colleagues, who work in all diverse areas, we have earned the nickname of the Rocket Docket. And that is despite a shortage of Judges compared to what some other counties are fortunate enough to enjoy. Our Judges are overworked but not complaining. And a Judge will hear a Domestic Relations matter on a Thursday morning and a property appeal later that afternoon and they do so with competency. And this diversity further justifies why Judge Panella's medal has been hardened for his position on the Appellate Bench.

With our sister jurisdiction of Lehigh County to the west, the Lehigh Valley is recognized as not just the place between the two metropolitan areas but a growing, vibrant area, an area where the Bench is respected and it is known as a nice place to practice law.

I'm probably stating the obvious in noting that today history is marked by the first time a member of the Northampton County Bench or Bar, for that matter, has assumed the duties of Superior Court Judge. Joining Judge Simpson on the appellate level from our County, Judge Panella moves up and we'll now find that people travel here by bus from Philadelphia and Pittsburgh hopeful that they will become appellate judges, they come just to drink the water. Judge Panella's service even at its zenith will always be a product of this quality Bench.

But before Judge Panella was Judge Panella he was Jack. And this provides the second source of precedence for his justification to assume further duties. He's no less a product of this Bar than he is a product of this Bench. And ours is a Bar even still with all the numbers we have, with all the squabbles we have from time to time, a Bar where a lawyer's word is his and her bond. And there is a civility among Northampton County lawyers and it is something that is known to us and it is a secret we keep. It is not uncommon for a Philadelphia practitioner to come here the first day of trial, he or she is just trying to get his or her way around. The second day they are telling you a little bit about what it is like to practice

in the big city. The third day they are asking you if the housing is expensive here. It is a reflection on the tone that the Bench sets, the expectation that the Bench communicates and the collegiate and camaraderie among our brothers and sisters. And Jack was a child of this Bar.

Judge Panella has taken an oath twice here before on memorable occasions. The first in 1980 as a lawyer. Judge Panella and I interviewed together when we were seniors in law school at the same hour, on the same day for the clerkship. A wonderful experience in Northampton County. We were in the second wave actually of applicants. The first wave had already had a few selections taken but they couldn't fill two positions so they had to dig a little deeper. Our good friend, Steve Molder, was in the first but Jack and I were in the second. And we interviewed first with all the Court. And then Judge Franciosa was conducting Juvenile Court so we went down and met with Judge Franciosa. He asked us each if we could consider remaining in Pennsylvania. I was living in Oklahoma and said it seemed like a nice place to raise a family; Pottsville, wife. I certainly would consider it. And Judge Panella said, Your Honor, I don't think so. But things did warm up. I went to Philadelphia, didn't know a sole but I came to the study group and there at the Bar review cram course was Jack Panella, Jay Leeson, John Morganelli. I asked them, "could I join your study group?", Judge Panella said no. His decisiveness was showing its way even then.

He became a busy practitioner after the clerkship and he was always on the move. You'd be in the courtroom at the Bench, you'd hear a huge metal can go over in the marble hallways, it would ring through the halls, somebody would say Jack. Somebody would lean on the light switch in the back of the courtroom, all the lights went off. You'd hear Judge Williams say, Mr. Panella, you are leaning on the lights.

His first day of practicing law he knew what to say because Judge Williams sat there, he said, Your Honor, may I approach the Bench? Judge Williams was busy and said, no, you may not, Mr. Panella. But Jack had only known what to say, not to what to listen to so he stood there like a puppy waiting for his biscuit until the Judge said, sit down.

With these things behind us we concluded that it was time for Judge Panella to be safe on the other side of the Bench.

Our Bar will have a lasting effect on the Superior Court through what we have given to Judge Panella. These include a number of qualities, perhaps foremost the courtesy. Courtesy he shows to members of the Bar and to litigants who come into his courtroom. This is before he sentences them. But it is a very genuine courtesy and whether you are in the cafeteria or in his chambers he will always address how the lawyer is being treated, how the process is being preserved and the signal that is being given to the litigants, in terms of the dignity of the process. And I understand there was one Montgomery County

lawyer who actually asked Judge Panella to recuse because he was showing too much friendliness towards that Montgomery County lawyer. He didn't trust the courtesy. That is an overstatement. But Judge Panella always has made out of County practitioners feel very much welcome here and the home rule advantage is definitely kept to a minimum where everybody is given their day in Court.

Judges always say I'll remember what it is like to have been a lawyer when I get on the Bench. And then somebody gives them a pill, sometimes not all of them, where the memory tends to fade. Judge Panella has shown on his tenure in Northampton County that he not only hasn't forgotten what it is like to practice law he truly does remember and he keeps that in mind, the constraints of the practice, the balances of the practice. And he is someone that will ask a lawyer can you be here next week before he orders them to be there next week. And at least he asks first. And it is something that makes a difference in the stress level of the practitioner.

Energy and industry are qualities that he will also take. We all get fatigued just from watching Jack work. You should expect promptness in his opinions that he renders on behalf of the Superior Court. I'm expecting that if I am fortunate or unfortunate enough to be there on appeal I will have an opinion in my FAX before I return from Philadelphia. He's shown dedication. He's never been somebody to shy away from hard work. He's put in the hours. And whenever a really late night is required he's never

hesitated to require his law clerk to do that work. He will bring a fairness, a compassion. He really has a contempt for injustice and it is something that I think will stay with him even at the appellate level. He doesn't like sharp practice. He doesn't like people pulling things. He doesn't like slick moves. He wants everything to be on the table and he wants to cause the lawyers to speak to one another whenever possible and work things out.

The third source of support in addition to the Bench and the Bar is his family. And Jeanne, there is a sainthood for you. Alison, Rocco and Brian, you are not only a credit to your dad you are so much like your mom, congratulations. Vivian, you did a beautiful job raising this boy. You were here in '91 to see him take the Bench. You weren't feeling well then. God bless you. We're to glad see you here today. And you should be so proud.

JUDGE PANELLA: That is my mom.

(APPLAUSE)

PHILIP HOF, ESQUIRE: And Ann Marie, your little brother, remember he said if you promised to move the Lehigh Valley, not Brooklyn I'll never bother you? I'll never ask you for a thing? Well, there is something above a sainthood and that is for you.

From his roots in Brooklyn, Jack has as shown a contempt for oppression, compassion for the disadvantaged person and a respect for hard work. And you never wanted it to be someone who brought a

litigant before Judge Panella who had not paid his or her dues in getting to where they should be because he had no patience with people who don't hold their own weight. But he always has a compassion for people who sometimes fall on hard times. And I think if he has a reputation for being stern with criminals it is because of not an anger directed towards them it is because of what they can take away from other people. And I think that is something that has not always been understood. And it is a rare quality. And it is one that I think helps preserve what we have. We're so fortunate to have Judge Panella as he's been so fortunate to have the Bench, the Bar and the family.

And, you know, there'd be some Judges who might become a little concerned that his friends and the lawyers and his own family wanted him to exit Northampton County so badly and offer to assist him in this. The truth is, Judge, we never expected you to be elected. Otherwise, we wouldn't have supported you so much when you appeared at Larry Holmes building and remember everybody was clapping and whispering, we were all saying, let Jack just get it out of his system, okay? And you know, let's hope he's not cranky when he's back on the Bench. And we just kept talking until you said something about appellate elections are very expensive and then everybody got quiet. And Larry left the room. But you did win, Judge Panella, you won big.

And I remember hearing that Father Sheehan, who was your Priest at St. Jane's, your parish, and

who is now I think a resident at St. Anthony's, you said to Father Sheehan, Father, I have prayed to St. Anthony hoping that it may help for this election and the day after Election Day. Father Sheehan said Jack, I think St. Anthony shot you out of a cannon. You won, from what I hear from people that I practice with and is in outlying counties, that you won because you have convinced them that you would obey by your oath of trust. A lawyer from Centre County yesterday said he seems like such a sincere guy and he seems to really care about the people that come before him. And these supportive sources provide precedent for a reliable prediction.

And in closing, my prediction is that Judge Panella will rule on the Superior Court with enthusiasm and with propelling force not intimidation. He will provide that level playing field even on the appellate level for the lawyers who come before him. He won't second guess or micro-manage or Monday morning quarterback the trial Judges, who after all are the people who are in the trenches and see firsthand what is going on. He won't immediately rush to judgment of a Common Pleas Judge who sentences someone even if it is not the maximum. And he will not substitute his own discretion for the sentencing Judge or the adjudicating Judge. He will simply make sure that there was fairness and an obeyance of law down below. And I believe that Judge Panella has shown he can do this without a preconceived political agenda and really the ideal jurist, in my mind. And I'm not a wise person. Yet anyway, the

one where you go before him or her and you don't say they are going to go this way because of who they are. They are going to go this way because of the facts and because of the law that should be applied. And that is the way Judge Panella has been. And I think that is why he's received bipartisan support and left and right support in being elected to this post because he has shown that lack of preconceived agenda. He'll remember the constraints and the demand of practicing law. He'll be sensitive that while appeals are pending lives are hanging in suspension.

And in weighing the individual liberties in these post 9/11 times, our cherished liberties with the need for collective security I predict that he'll remain a pillar of support for our cherished system of laws. And I sign respectfully submitted, a member of this cherished Bar. Thank you.

PRESIDENT JUDGE DEL SOLE: I will take a moment to introduce to the audience the Judges that e here from the Appellate Court in Pennsylvania. Immediately to my right is Justice Russell Nigro of the Pennsylvania Supreme Court of Pennsylvania, a good friend of Judge Panella and will have some remarks a little bit later.

Joining me today from the Superior Court are to my left Judge Kate Ford Elliott from Allegheny County; Justice Nigro to the right; Judge Michael Joyce from Erie County; on the left; Judge Correale Stevens from Luzerne County to my left; to my right Judge Richard Klein from Philadelphia County;

Judge Mary Jane Bowes from Allegheny County. And immediately in front of me is Judge Seamus P. McCaffrey from Philadelphia County. These are the Commissioned Judges that are here.

And our Senior Judges that are here, Judge Patrick Tamilia from Allegheny County; Judge Phyllis Beck from Montgomery County; President Judge Emeritus Stephen McEwen from Delaware County; Judge Justin Johnson from Allegheny County. Here today is a former colleague of ours, who just left service on the Superior Court, some say to make way for Judge Panella, that is Robert Graci. I know Bob is here and we thank him for coming.

And we also have present Judges from the Commonwealth Court of Pennsylvania, Judge Robert Simpson, I think you have all heard from around here; Judge Flaherty, Senior Judge from the Commonwealth Court, Allegheny County.

I have a letter that I have been asked to read: To the Honorable Jack A. Panella, Superior Court of Pennsylvania.

> Dear Judge Panella slash Jack, it is disconcerting to me that I am unable to personally attend the auspicious occasion of your elevation to the Superior Court of Pennsylvania. No doubt much will be said today relative to your legal capabilities, morality, tenacity and integrity. There is no need to be redundant.

I would; however, like to leave you with the words of wisdom passed on to be by my former colleagues of the Fifth Judicial District when I left to take my seat as a Justice of the Supreme Court of Pennsylvania, quote, fill the seat of justice with good men but not so absolute in their goodness as to forget what human frailty is, closed quote. It is without question that you have not only lived by these words of simplicity but will continue to carry yourself accordingly.

Godspeed on your tenure and any future endeavors. Very truly yours, Steven A. Zapalla, Chief Justice Emeritus, Supreme Court of Pennsylvania.

And now I would like to call upon Gerald Seyfried, the former Executive of Northampton County.

MR. SEYFRIED: Thank you. Members of the Clergy, Bishop Cullen, Honorable Judges, elected officials, guests, Jack Panella and his family and all his family members, good afternoon.

It is a privilege for me to be here and an honor for me to be here today to be part this joyous and history-making event, the swearing in ceremony for a friend, His Honor, Jack Panella, to a seat on the Superior Court of Pennsylvania is a first for Northampton County. Never before in the history of the county has an attorney been elected to Superior Court Judge. Not only is that a major feat but our friend, Jack, was also elected with an overwhelming vote. The election of Judge Panella to the Superior

Court is indeed significant for Northampton County. No longer is the County of Northampton in the shadows of Philadelphia and Pittsburgh. Northampton County is located in the third largest metropolitan area in the Commonwealth. And the election of Judge Panella to the Superior Court is recognition of that stature.

The achievement of being elected to this high appellate position is evidence when we took a look around the room and we note that dignitaries who are here today. This hall today is blessed with dignitaries and they come from all walks of life. We have with us his Excellence, Bishop Edward Cullen. We have with us today a distinguished member of the Supreme Court; Federal Court; members of the Superior Court; Commonwealth Court; Court of Common Pleas and also in attendance the Secretary from the Governor's Cabinet; Senators; Representatives and many, many other elected officials.

This is truly an historic moment in the history of Northampton County. The court stenographer is recording the words of each speaker today and these minutes will become part of our written history. The documents will be entered into our Archives for future generations to relive this moment. That is why it is important that today we note for the record some important information about our friend, Judge Panella.

This I want in the record. It was on March the 27th in 1992 that I beat Jack Panella in a game of

handball. Now you guys know this, at least you know how he runs and he's in these marathons, well, that's right, because one chink in his armor, he didn't know this, the athleticism in this body, I'll tell you.

I had to get that in there, Your Honor. People have a right to know.

It seems no matter where you go Judge Panella always makes friends. And he makes a lot of new friends. Now, don't get me wrong, not everybody is this man's friend. Our prison is full of individuals over here who have a different opinion of him, okay?

But Judge Panella, as we knew him, 10, 15 years ago, Jack has always been a very dedicated public employee. He served as a Solicitor for the County of Northampton under the late Gene Hartzell. He served as County Solicitor to my Administration in the early 90's. He went on and joined an outstanding group of individuals on the Northampton County Bench. Judge Panella has served our community with dignity as a member of the Court of Common Pleas. He has risen to the highest pinnacle of his profession. He has always faced tough decisions and new challenges in all his endeavors. He has met and passed the test with flying colors. I was almost always amazed at the energy level of my friend. And it takes a special guy to fulfill duties of Solicitor of this County and still find time to go to trial once a month. Plus he found time to go to Brooklyn to visit his mother on a regular basis. And we could always tell when he went to Brooklyn. Every office on the fourth floor

would have cannolis and Italian goods and they'd be there for days.

Recently I spoke with many individuals in the Courthouse and many of your friends, Jack, and asked them if they were able to come to the podium today what is the message that they would leave for the record? So for all those individuals here, of who I talked with who are not able to come to the podium today but are with you in these chambers and with you in their thoughts, this is their message. Now you go on to meet new challenges as a member of the Superior Court of Pennsylvania. Judge Panella we're all here today to wish you well. The truest recognition of what I have achieved is that which comes from the hearts of your family, your friends and your co-workers who have come here today to share this moment with you. As you face those new challenges remember me and all your friends. We here are only one of any army of friends who will always be with you. We wish you the best.

And this message comes from all your friends here in Northampton County. Thank you.

PRESIDENT JUDGE DEL SOLE: Thank you, Mr. Seyfried.

You may wonder when I was introducing my colleagues on the Bench that I was going from left to right with the names and that is because we generally try and do things based on seniority. And the law of the Commonwealth requires that when the Judges are elected to the same Court on the same day that

you draw for seniority. That would really let you determine where you sit on the company picture, you either get to sit in the middle or at the end and all of you probably will be very happy to know that Judge Panella drew the last number so he is the lowest in seniority of the Commissioned Judges on the Court.

I want to take a moment also to introduce to you some of the Judges that are here. First again Judge Robert Freedberg, the President Judge of Northampton County; and Judge, again, thank you for this beautiful courtroom and use of it, to you and the County and the citizens of this County it is magnificent and you can be very proud of it.

PRESIDENT JUDGE FREEDBERG: We're honored that you are here.

PRESIDENT JUDGE DEL SOLE: Thank you. We'll see how that works when Judge Panella starts writing reversals.

Now, there are a number of Judges here. I'm just going to name them that are here. If I don't have your name on this list and I don't call your name and you feel you are so important that you should be introduced, please give me your name and we'll take care of it.

Judge Stephen Baratta; Judge Emil Giordano; Judge Chester Harhut; Judge Kimberly McFadden; Judge William Moran; Judge Arnold New; Judge Edward Reibman; Judge Edward G. Smith; Judge

James C. Hogan; Judge Isaac Garb; Judge Robert Blasi, from Philadelphia Municipal Court.

And we also have some of Judge Panella's colleagues from the Court of Judicial Discipline, the President Judge Sal Cognetti; Judge James Beasley; Judge Robert Capoferri; Judge Christine Donahue; Judge Carol McGinley, who is also a common Pleas Court Judge in Lehigh County; Judge Paul Panepinto, who is also a common Pleas Court Judge in Philadelphia; Judge Ralph Sposato, the President Judge Emeritus of the Court; Judge Joseph Sweeney; Judge Esther R. Sylvester, another President Judge Emeritus of the Court and also Common Pleas Court Judge in Philadelphia.

And we also have with us today the distinguished Auditor General of Pennsylvania, Bob Casey, Jr.

Thank you for coming.

Now I would like to introduce my predecessor as President Judge, a dear colleague and a great friend, the Honorable Stephen J. McEwen, President Judge Emeritus of the Superior court of Pennsylvania and President Judge Emeritus of the Court of Judicial Discipline of Pennsylvania.

PRESIDENT JUDGE McEWEN: May it please the Esteemed Justice Nigro; Your Eminence, Edward Cullen; Monsignor Hayek; members of the Clergy; President Judge Joseph Del Sole and my cherished colleagues upon the Superior Court; Judges Harhut and Simpson of the Commonwealth court. May it also

please, as well, Judge Panella's wife, Jeanne; daughter, Alison; sons, Rocco and Brian. As well as I understand Mrs. Panella and his sister here today. May it please all the members of the Panella clan as well as the members of the Bar of Pennsylvania here and all of the many friends, legions of friends present here today. And may it please, World Heavyweight Champion Larry Holmes. He's a fellow you want to please at all times.

We assemble this afternoon for the Ceremony of the Oath of Judge Jack A. Panella. The occasion is, of course, much more than a ceremony since his pronouncement of the Oath of Judge of the Superior Court is, in a very real sense, a moment of passage which marks a consecration of his career to the cause of appellate jurisprudence and enables celebration by all of us, the citizenry of Pennsylvania, will continue to be the beneficiary of his very special gifts.

Whether we describe the occasion as a consecration, or a celebration, or a ceremonial, a glance over the room makes it clear and certain that the rich, warm, happy glow, which each and all sense and feel, and reveal and reflect, can be described in a single phrase, absolute joy. While I am present here today as a friend of Judge Panella and his new colleague upon the Superior Court, I address this august assembly on behalf of the Pennsylvania Court of Judicial Discipline, President Judge Sal Cognetti and the other members of the Court to whom you were just introduced by President Judge Del Sole. That is a

Court upon which Jack and I both served as President Judge, thereby enabling me to bear clarion witness to his sterling performance as a architect of the jurisprudence of judicial conduct review in Pennsylvania.

In 1993 the citizens of Pennsylvania, by firm ballot and ringing pronouncement, changed the Constitution of Pennsylvania and directed that the system of judicial conduct review by conducted by two separate and autonomous agencies: A twelve member Judicial Conduct Board to consider complaints relating to judicial behavior, and an eight Judge Court of Judicial Discipline to conduct trials in those cases where the Judicial Conduct Board concluded there was prima facie cause for that complaint. It is a system which our illustrious President Judge Del Sole is so well familiar, since he was elected by the 12 members of the Board to be the very first Chairman of that Board. Now surely it is instantly clear that the court of Judicial Discipline performs a unique and critical role in our government, since it must achieve a precious balance between a duty to inspire in the citizenry, including the legislature and the executive branches, a confidence in the integrity and competence of all judiciary as well as that duty to inspire the confidence in the citizenry.

It has a responsibility to inspire a confidence in the 450 Common Pleas Court Judges and 500 District Justices throughout the State that the Court of Judicial Discipline is a fair tribunal and not a pawn of either politician or publisher.

I can tell you that the judges of the court of Judicial Discipline, quickly upon the arrival of Judge Panella to that Court, realized that he is an individual who blends superbly, an intellect which transcends cleverness, with a spirit of dedication and commitment. And I can assure you that the guidance and counsel of Judge Panella during his four year term as judge and as President Judge of that Court enabled the Court of Judicial Discipline to attain those goals by molding for decades to come the jurisprudence of Judicial Conduct Review.

Now, a few weeks ago before this past election, a revered and deeply admired observer of the political scene, having watched the judicial candidates during the preceding year, characterized Judge Panella as a Hollywood Collage, because Judge Panella revealed the soft, shy side of Jimmy Stewart, the grit and determination of Clint Eastwood, and the glint of eye and sparkle of smile of Paul Newman. Thus it would seem that destiny played a part in his election to the Superior Court since he will then join a Court already renowned for Judges who are strikingly attractive and of star quality.

And so it is that I welcome my friend and colleague Jack Panella and thank him for the honor of participation in his Ceremony.

PRESIDENT JUDGE DEL SOLE: Thank you, Judge McEwen. I understand that Senator Lisa Boscola is here; Representative Richard Grucela; district Attorney John Morganelli. We also have

District Justice Nancy Matos-Gonzalez; District Justice Joan Marinkovitz; and District Justice Elizabeth Romig.

Now I assure you that concludes the lists that they gave me so I repeat, if anybody wants to be recognized by the Court at this time.

I call upon Attorney Leonard Zito.

MR. ZITO: Your Honor, may it please the Court, my attention was distracted just a few moments ago from the remarks because I never thought I would be involved in a ceremony where Judge Panella would be equated with Clint Eastwood, Dirty Harry?

Thank you, Judge, I appreciate that.

May it is please the Court, members of the Court and honored guests, on behalf of the Bar of Northampton County I introduce and move into the record that commission of the Honorable Edward Rendell, Governor of the Commonwealth of Pennsylvania certifying to the election of Judge Jack Panella to the Superior Court of Pennsylvania.

With the permission of the Courts, I now call Donald Cunningham, Jr., our Secretary of General Services for the Commonwealth of Pennsylvania, and I request that he read into this record the Commission of Governor Rendell.

Mr. Cunningham.

PRESIDENT JUDGE DEL SOLE: Permission granted.

MR. CUNNINGHAM: Before I read the Commission I just want to say that it is a tremendous honor and a privilege on two counts to have the great distinction of being able to read our Commission.

Judge Panella, first it is an honor to be here on behalf of Governor Rendell. I wanted you to know that he sends his regards, his congratulations.

And secondly, it is a great honor because the Panella and Cunningham families have become quite linked together over the last several years, with my father working for Judge Panella, spending a lot of time the last year with Judge Panella, and now working for Judge Panella in his new role on the Superior Court. So both from a family, and a personal level, and a professional level it is my great honor to read these commissions into the record.

> It appears by the certificates and returns made, according to law of the election held on the 4th day of November, 2003 that you, Jack Panella, have been duly elected Judge of the Superior Court in the Commonwealth of Pennsylvania; therefore, know ye that in conformity to the provisions of the Constitution and laws of the said Commonwealth and such case made and provided, I do hereby present this Commission to you as Judge of the Superior Court of the Commonwealth of Pennsylvania, Third Priority of Commission. To have and to hold the said office together

with all the rights, powers and emoluments thereunto belonging or by law in anywise appertaining – I didn't write this – for the term of 10 years, to be computed from the first Monday of January, 2004, if you shall so long behave yourself well. Given under the hands and great seal of the State of Pennsylvania, the City of Harrisburg, on the 2nd day of January, the year of our Lord, 2004, Edward G. Rendell, Governor.

PRESIDENT JUDGE DEL SOLE: Thank you, Mr. Secretary.

MR. ZITO: Thank you, Mr. Cunningham.

Your Honor, nearly 10 years ago to this date our late colleague, Renald Barrata, moved the Northampton County Court to administer the oath of Judicial Office to Jack Panella as a member of the Northampton County Court. In his memory and under the authority of the Commission of the Governor, I now similarly and respectfully move this Court to administrator the judicial oath of Judge Panella entitling him to enter into the duties as a judge of the Superior Court of Pennsylvania.

PRESIDENT JUDGE DEL SOLE: Motion is granted.

MR. ZITO: Thank you, Your Honor.

PRESIDENT JUDGE DEL SOLE: Jack, it was a long time coming.

JUDGE PANELLA: I know.

PRESIDENT JUDGE DEL SOLE: Ladies and gentlemen, I introduce the Honorable Russell M. Nigro, Justice of the Supreme Court of Pennsylvania.

JUSTICE NIGRO: Thank you, President Judge Del Sole.

I want to apologize for my voice. I want you all to understand that I'm not attempting to audition for Godfather 4; unfortunately, my family doctor, who happens to be a personal friend of mine, started calling me about 3 or 4 weeks ago suggesting and imploring me to get a flu shot, which I have never gotten, never before. And he called me 2 to 3 times and told me he was running out of flu shots vaccine and that I better get down to his office to have this flu shot. Well, against my better judgment thinking he was the doctor and knew more than I did, I went down and got my flu shot and I have sounded like this ever since. So I know we have a lot of lawyers in the audience, if you all want to leave your business card.

Let me say that this is a great day for the Panella family, and it should be. It is my privilege and honor to not only be here and come back and visit this Courthouse, as I did many times in my two campaigns in '93 and '95, and got an opportunity to see a lot of you again and it brings back a lot of wonderful memories. The memories weren't quite as good in 1993 but they were great in 1995. And history has a way of just remembering the good things, I guess. But I had the opportunity at that time in 1993

to meet Jack. He's a wonderful human being. He's a hard working guy. When he called me up about a year ago and said, can I come down and speak with you? Because I'm thinking about doing something important in my life and, you know, I'd like to have your opinion. So he came down to speak with me and had indicated that he was thinking about running for the Superior Court and the advice that I gave him, which I felt was more important than anything else, was that he should be honest with himself and honest with everybody he came in contact with. And that he should work very, very hard because it is a very, very tough task to place yourself out there to the people across the entire state. I said, you don't want to wake up the day after the election, look in the mirror and say to yourself, I lost a very close election and I should have done this and I should have done that.

Well, I can tell you the man exceeded the expectations of what was necessary to be successful. His hard work and dedication, his focus was very, very critical and allowed him to be successful. Now the problem is, Jack, is that you now have to accept the responsibility of winning this 10 year term to the Superior Court and you have an obligation to the people of this state to do your very best day in and day out to decide the cases fairly, to decide the cases competently and to not get caught up in the trappings of being on the Appellate Bench. I have confidence that you will do exactly those things during the next 10 years. And everybody here in this room will be happy 10 years from now, as they are today, that you

did exactly what they asked you to do, your job in the right way. So I congratulate you and I congratulate your family. And again, as I said, it is a pleasure to be back here in Northampton County.

With that will everybody please rise. I need a little help from the audience. I need Master Brian Panella to come up because you need to help out your dad here. You have got to hold that Bible while I administer the oath of office.

Judge, please repeat after me: I Jack Panella.

JUDGE PANELLA: I, Jack Panella.

JUSTICE NIGRO: Do solemnly swear.

JUDGE PANELLA: Do solemnly swear.

JUSTICE NIGRO: That I will support, obey and defend;

JUDGE PANELLA: That I will support, obey and defend;

JUSTICE NIGRO: The Constitution of the United States;

JUDGE PANELLA: The Constitution of the United States;

JUSTICE NIGRO: And the Constitution of the Commonwealth of Pennsylvania;

JUDGE PANELLA: And the Constitution of the Commonwealth of Pennsylvania;

JUSTICE NIGRO: And that I will discharge;

JUDGE PANELLA: And that I will discharge;

JUSTICE NIGRO: The duties of my office;

JUDGE PANELLA: The duties of my office;

JUSTICE NIGRO: As a Judge on the Superior Court of Pennsylvania;

JUDGE PANELLA: As a Judge on the Superior Court of Pennsylvania;

JUSTICE NIGRO: To the best of my ability;

JUDGE PANELLA: To the best of my ability;

JUSTICE NIGRO: And with fidelity;

JUDGE PANELLA: And with fidelity;

JUSTICE NIGRO: So help me God.

JUDGE PANELLA: So help me God.

JUSTICE NIGRO: Congratulations to you.

(APPLAUSE)

PRESIDENT JUDGE DEL SOLE: Before we proceed to the next event on the program at this point one or two of our Judges may be leaving because they have flights to catch back home. So you understand that Jack, they are not leaving because you are coming on the Bench.

Now to robe our new Judge is John Morganelli, the District Attorney of Northampton County and Martin D. Cohen, Esquire. Will you come forward.

(Judge Panella was robed.)

PRESIDENT JUDGE DEL SOLE: Your Honor, do you have any response, or disclaimers or anything?

JUDGE PANELLA: Clint Eastwood, Paul Newman? Jeanne doesn't know how good she has had it over the years.

Thank you very much, Judge.

With all my heart I thank you, all of you.

Just a few quick things. In 1991 when I first took the Bench, if any of you know what my name means you know it is bread. I was granted a gift by Judge Hogan and I thought it only right to return the favor. So Judge Hogan, we have a loaf of Italian bread for you.

Many of you remember back in 1991, when I first took the Bench, there were a lot of bets being made that I could not sit long enough to be a Judge. As a matter of fact, Judge McFadden gave me this seat-belt.

We just finished the campaign. I was up all over the state, standing up, walking around the room.

Larry, my good friend, you made a comment once about me speaking and walking around. I have been sitting for this entire Ceremony.

Judge, may I have permission to approach the podium, please?

PRESIDENT JUDGE DEL SOLE: I think your colleagues want me to say no but please do.

JUDGE PANELLA: Thank you, Judge.

Excuse me one moment. That feels so much better.

You have to bear with me, a few people and a few organizations I must thank.

First, and I'm going to make you all work with me just a little bit, this is long overdue. In 1980 it was a privilege of mine to join the Northampton County Bar Association, a group of professionals dedicated to the practice of law, to representing the interests of individuals, protecting their Constitutional rights and also protecting our streets.

I would like very much if all of you would please stand with me in a salute to the greatest Bar Association in the world, the Northampton County Bar Association.

(APPLAUSE)

Thank you. Without them Judge Simpson and I would have been nowhere. They stood behind us coming from the Lehigh Valley.

You know, the campaign was rather grueling, from February till November I put forty thousand miles on my car and that doesn't include when Mike

Prestipino drove, also doesn't include the times I flew. And believe me, I have enough frequent flyer miles for all of us to go to Hawaii. The way I stayed focused, the way Jeanne and I tried to stay centered on the campaign, to remember the reasons we really decided to direct our lives towards public service for working for our fellow men and women, for doing things for the good of our community, what I did was I did my best to engage in daily prayer and to attend Mass as often as I could. You see in this room we're all of different religions but the one thing that all Americans share is that inner core of morality. It forms the basis of decency in our Country. And we have to remember why we're here and why we were put here. That is why it was such a joyous occasion for my family and me that Bishop Edward Cullen took time from his busy schedule to join us for today, the chosen leader of my faith in the Lehigh Valley. So please join me in thanking Bishop Cullen.

(APPLAUSE)

You know, they put a microphone in front of me on Election night and I didn't know what to say, so they said, would you like to thank anybody? Of course I'd first like to thank God, I'd like to thank my family and I'd like to thank the Sons of Italy. I had to, during the course of the campaign, join every Italian American organization in the State. In Pittsburgh, I think it was a Calabrese organization, in Pittsburgh they fed me some kind of meat pie. It is still right there. Wherever I would go they would say, sit down,

eat something. I would say, but I have to give a speech. It is okay you have time, sit down and eat.

If there is one example that I have to make, if this is anything like 1991, when I was sworn in, there are many Italian Americans out there, it would have to be the support I received. Many of them are members of the Sons of Italy. I wanted to say something in Italian to all of you but having been born in Brooklyn it is difficult enough for me to speak English so that you can understand me so I asked my good friend, Judge Ralph Sposato to join me for a moment to say something in Italian. Judge Sposato.

JUDGE SPOSATO: I am extremely honored that I could express sentiments on behalf of my dear friend, Jack, in Italian, the language of our ancestors.

(Judge Sposato spoke in Italian.)

Thank you very much.

JUDGE PANELLA: Lori, did you get all that down?

Regrettably there are a few important friends that are not here with us today, although they should be, and they are in our hearts. Attorney Joseph Leeson taught me first how to be an attorney. Gene Hartzell will always be in my memory; he appointed me County Solicitor and gave me guidance in the early portions of my career. Judge Alfred T. Williams, when I first joined the Bench, when I was an attorney, I don't know what life would have been like without him.

When I'm asked to name the finest individuals I have come across in my life, I always name Governor Robert Casey as one of them. I treasure his book, which he gave to me, Fighting for Life. It has served as an inspiration to me. And again, I can't be grateful enough that a representative of his family, Bob Casey, Jr. is here with us.

The last one is a very appropriate one to talk about today because he represents many of the groups that we just spoke about. After my clerkship, I didn't want to practice law with anyone other than Renald Baratta. Renald Baratta was an excellent attorney in a courtroom. No one matched him. He was the type of person to lead, give guidance to young attorneys. I asked him, "Renald, may I practice with you?" He right away opened up his office, gave me a desk. Believe it or not Jeanne was my secretary back then and he gave us the opportunity to form a life for ourselves here in Northampton County. I remember once his secretary came up after I just shortly started practice, Renald says on a Friday afternoon, have a good weekend and here is two hundred dollars, go buy some groceries. That is the kind of heart he had. On behalf of all of the members of the Bar Association I want to acknowledge Renald as an example of this Bar Association. And Pat Baratta, where are you? Pat, I thought you responded. Give me a moment. Sometimes we don't get the opportunity to say good-bye to our friends. Sometimes we don't get the chance to tell them how important they are to us, or to give them the proper recognition they deserved. In

Renald's honor today, I would like to make a presentation to Pat Baratta. Pat.

I have been working in this Courthouse since 1980, the finest group of individuals you could ever think of working with, Prothonotary's Office, Criminal Division, all of you out there. We tried to reserve seats for you, too, so you could be up front. The Probation Department, Juvenile and Adult, Mark Mazziotta, so many times I have attorneys in chambers and the phone would ring. I'd pick it up and I'd say excuse me, it is the Chief Adult Probation Officer, I have to speak to him. I go silent. Yes, yes, Mark, I love you, too. Tell me what you need me to talk to me about. The greatest group of individuals that a person could ever think of working with are located right here in Easton, in our Courthouse. The Courtroom 5 staff, wonderful people. My former secretaries are here. My current secretary, Val, Alicia. Most of my former law clerks are present in here. All of you, the greatest in the world, really. A Judge doesn't do this job alone. It is the people doing the backup work that get you there and have you prepared in Court, have those cases move along.

There is not too much I can say about Spaz that you don't already know. It has been wonderful, Spaz. Charles Spaziani really taught me – a true story. When Spaz and I were interviewing a perspective client, he came in and just as we were walking out he turned to me and he said, well, I need this zoning variance who do I bribe? So I went to Spaz's office and I said, Spaz, that is what he said to me should I show

him the law? And Spaz said, no, you show him the door. Spaz, again from the bottom of our heart it is wonderful being with you.

There are two special people I have to talk about right now. One of them is not really part of this but he should be because he's not really sitting in the close well of the Court. And I'm going to follow a little lead by Justice Baer right now, for all of the years of guidance, friendship, just about anything you could think of, I would like Gino Giunta, I would like you to take my seat next to Spaz at counsel table now that I'm not sitting there, please.

Bernice Lavella, where are you? She has been with me almost my entire career in Judge Franciosa's office, in private practice, then again back into my judicial office, gave me great advice during the campaign, worked with me. Was there stuffing envelops, doing everything like that. Life would have been nothing for us without you, Bernice. And you have to bear with me one moment again. And again, it is the people behind the scenes that never get the recognition. For everything a judge does, there is a judicial secretary behind the scenes. When a lawyer is in Court it is typically that legal secretary that has prepared everything. Well, this is the fine example of a person who makes people like me look good. Bernice Lavella.

It is not without a great deal of regret that I part company, for now, with a dear friend, Judge William Moran. We have worked together in a professional

capacity for longer than I care to mention. He trained me well in the County Solicitor's Office, and then it was a unique experience when I again joined him, this time on the Northampton County Bench. His friendship and his advice have guided my career – I look forward to the day we work together again.

As I said, there are too many people to thank from the campaign. I must make specific mention though of Attorney Steven Goudsouzian, who sacrificed many long hours. Without the guidance and support of people like District Attorney John Morganelli, Martin Cohen, my good buddies, Phil Hof and Steve Molder, Joe Long, and John Werkheiser, and there are so many others – I apologize if I missed you – from the bottom of my heart an endless thank you.

Now I have family over here. What can I say about my wife? She has backed me all the way, all these crazy decisions, career moves we decided to make to try to serve the public. She has stuck with me through thick and thin, agreed with me when I wanted to leave private practice and go full time into public service. And there is not much more I can give to you, Jeanne. There is one thing I know that you don't have. Just one moment. If anybody deserves a trophy it is Jeanne Panella.

Now, I have given flowers to Bernice, to Pat. My mom and sister are here. Do you think I'm crazy? I got them flowers, also.

JUSTICE NIGRO: I wish I had the florist concession.

JUDGE PANELLA: You know inspiration comes from many different parts of our life. For me one of the strongest areas is among the people of Pennsylvania, people of Northampton County. I had the privilege of accompanying my good friend Phil Noto to Bosnia to visit the Pennsylvania National Guard. Young men and women who are stationed in Bosnia to protect us and they are in foreign and dangerous soil but they are there to protect us. They are sacrificing for us.

Here in Northampton County I know my friends, the sacrifices they have made over the terms of their lives, working hard in steel mills and horrible furnace rooms, working in the coal mines. As I would travel around the state I would meet some fellow Pennsylvanians who want nothing more than to have a job and support their families. They want medical coverage. They want some type of plan there to make sure that the members of their families are protected in the event of an emergency or in the event that medical treatment is necessary. It is the great people of Pennsylvania. You know we rebuilt Germany and Japan after World War II and we're now going to undoubtedly send billions of dollars to rebuild Iraq. My thoughts are for our Americans right here in Pennsylvania at times, people who want to have dignity, want to support their families and raise their children, and see their children educated. Well, that's where my inspiration comes from and that is why

Jeanne and I decided many, many years ago to direct our lives full time into public service. And look at the people I've become associated with, all with the same values. And I have been involved with politics for too many years to know there are many out there that are not sincere. That is why I wanted my sons' classes to be here, students from the high school and from grammar school. I want all of you to know that never let the concept of downsizing or the concept of one hundredths of a percent more of a profit margin to interfere with your responsibility to your fellow men and women. There are people out there that need you. That is why Jeanne and I made this decision and that's why, believe me, I have no hesitation in closing when I say to you God bless the people of Northampton County. God bless Pennsylvania. And God bless America.

Thank you.

PRESIDENT JUDGE DEL SOLE: Please be seated everyone.

Jeanne, your husband has asked me to enter an order prohibiting you from giving that trophy back to him to put in his chambers but I won't do that. If you want to send it to him you can have it out there.

JEANNE PANELLA: Thank you.

PRESIDENT JUDGE DEL SOLE: Judge Panella has asked that I advise everyone that there is a reception beginning at 3 o'clock at the Candlelight. I assume everyone here knows where that is.

At this time I would call upon Monsignor Sami Hayek of our Lady of Lebanon Church for the Benediction.

Monsignor.

MONSIGNOR HAYEK: Heavenly Father, we stand before Your divine majesty now for Your servant and son, Judge Jack Panella, his family and friends, the spirit of joy, gratitude, after celebration for all his accomplishments and all Your blessings upon him and his family. We implore You to continue to look upon him as he assumes further responsibility now in his noble profession, confirm him in his commitment to work for the truth, social justice, peace and harmony among people. And that his decisions in the future may always be as they have been in the past, for the benefit of others, and serve the needs of society.

Heavenly Father, all power, glory, praise and worship belong to You now and forever until all eternity. Amen.

PRESIDENT JUDGE DEL SOLE: Now I would ask that Matthew James Allshouse come up again for a rendition of God Bless America.

(Matthew Allshouse sang God Bless America)

PRESIDENT JUDGE DEL SOLE: You may be seated. Friends and colleagues, we thank you, everyone here in Northampton County, for the courtesy that they have extended to us on this gorgeous day,

wonderful day in the life of the Panella family and a great day in the Superior Court.

Anything further?

MR. MORRISSEY: No, Your Honor.

PRESIDENT JUDGE DEL SOLE: Would you please adjourn.

MR. MORRISSEY: This very special session of the Superior Court of Pennsylvania is now adjourned.

(COURT ADJOURNED)